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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1995

CONTEL CELLULAR INC. AND
CONTEL CELLULAR OF ILLINOIS, INC.,

Petitioners,

v.

LEAF RIVER VALLEY CELLULAR TELEPHONE
CO., INC., AND CENTRAL CELLULAR
TELEPHONES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission's exclusive jurisdiction over cellular telecommunication licenses under sections 310 and 332 of the Communications Act preempts the Illinois state courts from asserting jurisdiction, under section 414 of the Act, over an action in contract and tort that involves the right to receive profits from ownership of a license issued by the Federal Communications Commission where such participation in ownership of the license would conflict with FCC regulations, 47 C.F.R. § 22.942, prohibiting ownership of both licenses in the same market.

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

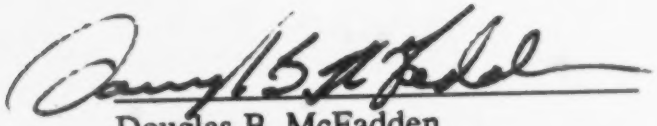
Parties to the proceeding below are also parties herein except Rockford MSA Limited Partnership.

Petitioners, Contel Cellular Inc. and Contel Cellular of Illinois, Inc. are subsidiaries of GTE Corporation, a publicly-held corporation with subsidiary companies which are engaged in a variety of telecommunications businesses. GTE Corporation has the following subsidiaries or affiliates which have outstanding securities in the hands of the public:

BC TELECOM, Inc.
Caribbean Reservation Center, C. por A.
Communicaciones Telefonicas, C. por A.
Florence Cellular Telephone Company, Inc.
GTE California Incorporated
GTE Directories Corporation Lanka (PVT.) Ltd.
GTE Florida Incorporated
GTE Hawaiian Telephone Company Incorporated
GTE North Incorporated
GTE Northwest Incorporated
GTE South Incorporated
GTE Southwest Incorporated
Jacksonville Cellular Telephone Corp.
Jacksonville Cellular Communications, Inc.
La Compagnie de Telephone Anglo-Canadienne/
Anglo-Canadian Telephone Company
MTX Italia

Parque Industrial ITABO, S.A.
Quebec-Telephone
Radiowealth, Inc.
The Micronesian Telecommunications Corporation
Wilmington Cellular Telephone Corp.
Wilmington Cellular Communications, Inc.
Zona France Las Americas

Respondents, Leaf River Valley Cellular Telephone Co., Inc. and Central Cellular Telephones, Ltd. are subsidiaries of Telephone and Data Systems, Inc. ("TDS"), a company whose stock is publicly traded. Respondents Leaf River Valley Cellular Telephone Co., Inc. and Central Cellular Telephone Co., Inc. are partially owned by United States Cellular Investment Company of Rockford, which also is a TDS subsidiary.



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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in case No. 79010 on October 4, 1995.

OPINION BELOW

The underlying opinion of the Circuit Court for the 17th Judicial Circuit of Illinois, issued on October 12, 1994, is appended hereto (A - 1); the opinion of the Appellate Court of Illinois, Second District in No. 2-94-1303, affirming the Circuit Court, is appended hereto (A - 10); the order of the Supreme Court of Illinois in No. 79010 denying the petition for leave to appeal is appended hereto. (A - 18).

JURISDICTIONAL STATEMENT

The order of the Supreme Court of Illinois denying the petition for leave to appeal was entered on October 4, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Art. VI, Clause 2:

> This Constitution, and the law of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . .

47 U.S.C. § 151:

> For the purpose of regulating interstate and

foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C. § 301:

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of

> energy or communications or signals by radio . . . except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 310(d): Assignment and transfer of construction permit or station license.

> No construction or station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. . . .

47 U.S.C. § 332(c)(3): State preemption.

> (A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service . . . except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 414: Exclusiveness of chapter.

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at

common law or by statute, but the provisions of this chapter are in addition to such remedies.

47 C.F.R. § 22.942[1]: Limitations on interests in licensees for both channel blocks in an area.

> No person may have a direct or indirect ownership interest in licensees for both channel blocks in overlapping cellular geographic service areas (CGSAs), unless such interests pose no substantial threat to competition. A licensee, a person that owns a controlling interest in a licensee, or person that actually controls a licensee for one channel block in a CGSA must not have any direct or indirect ownership interest in the licensee, a person that owns a controlling interest in a licensee, or a person that actually controls a licensee for the other channel block in a overlapping CGSA.

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[1]The FCC reorganized the rules governing cellular radiotelephone service, effective January 1, 1995. The "cross-block" ownership restriction and transfer of control provisions were not substantively changed insofar as they relate to this case. In previous briefs below and the appellate court opinion it was cited as 47 C.F.R. § 22.902(b); in this petition, it is cited by its new number, 47 C.F.R. § 22.942. The assignment of authorization/transfer of control provision, cited as 47 C.F.R. § 22.39 below is cited as 47 C.F.R. § 22.137 herein. The former text of these rules is found in the appendix to this Petition at A - 43.

(a) A direct or indirect ownership interest of 5% or less in both systems is automatically excluded from the general rule prohibiting multiple ownership interests. Interests of less than 5% are considered and are not excluded from the general rule prohibiting multiple ownership interests in cases of persons or entities that own a small percentage of the licensee but nonetheless actually control the licensee, a person that owns a controlling interest in the licensee, or a person that actually controls the licensee.

(b) Divestiture of interests as a result of a transfer of control or assignment of authorization must occur prior to consummating the transfer or assignment.

47 C.F.R. § 22.137: Assignment of authorization; transfer of control.

Authorizations in the Public Mobile Services may be assigned by the licensee to another party, voluntarily or involuntarily, directly or indirectly, or by transfer of control of a licensee holding such authorizations, only upon approval by the FCC. The assignee is responsible for ascertaining that the stations facilities are and will remain in compliance with the terms and conditions of the authorization to

be assigned.

> (a) Application required. The assignor or transferor must file an application for approval of assignment or transfer of control (FCC Form 490). In the case of involuntary assignment, such application must be filed no later than 30 days after the event causing the assignment. The assignee or transferee must file a report qualifying it as a common carrier (FCC Form 430) unless a current report is already on file with the FCC.

* * *

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Respondents, Leaf River Valley Cellular Telephone Co., Inc. and Central Cellular Telephones, Ltd., (hereinafter collectively referred to as "Leaf River" or "respondents") each brought separate actions against petitioners Contel Cellular Inc. and Contel Cellular of Illinois, Inc. (both hereinafter collectively referred to as "Contel" or "petitioners"). Both respondents alleged that Contel breached its partnership agreement and fiduciary duties in applying for and ultimately being awarded the license from the Federal Communications Commission

("FCC") to operate a cellular telephone system in rural northwest Illinois. Respondents alleged that a provision in the partnership agreement required that Contel's application for the license should have been deemed to be on behalf of the partnership holding the license from the FCC in Rockford. Respondents seek to have Contel turn over its profits from the rural cellular system to the Rockford partnership. (A - 27-29; A - 39-41)

Contel moved the circuit court to either dismiss these cases on the grounds of federal preemption under the Supremacy Clause of the Constitution of the United States or stay them pursuant to the doctrine of primary jurisdiction so that the FCC could determine whether federal communications laws and regulations barred the conduct and relief sought by Leaf River.

The circuit court denied both petitioners' motion to dismiss and the motion for a stay on October 12, 1994. (A - 6). Petitioners filed their Notice of Interlocutory Appeal on November 10, 1994. The Appellate Court affirmed the Circuit Court on March 21, 1995 (A - 17). On April 11, 1995, petitioners filed their affidavit of intent to seek leave to appeal to the Illinois Supreme Court. On April 25, 1995, petitioners filed a petition for leave to appeal in the Supreme Court of Illinois. Petitioners raised the question of federal preemption before both the Appellate Court and the Supreme Court of Illinois. The Supreme Court of Illinois denied the petition for leave to appeal on October 4, 1995. (A - 18).

STATEMENT OF FACTS

In May of 1986, the Rockford MSA Limited Partnership ("Rockford Partnership") was formed by petitioner, Contel Cellular Inc., respondent, Leaf River Valley Cellular Telephone Co., Inc., respondent, Central Cellular Telephones, Ltd., and non-party Ameritech Communications, Inc.[2] Ameritech and Leaf River are limited partners in the Rockford Partnership. Contel is both a limited partner and the general partner in the Rockford Partnership. (C. 103-04.). The Rockford Partnership was formed to provide cellular telephone service in the Rockford, Illinois metropolitan area pursuant to a license issued by the FCC. (C. 98-99).

Pursuant to its regulation of the cellular telecommunications industry, the FCC has divided the United States into geographic service areas. Urban areas are designated as Metropolitan Statistical Areas ("MSA"); more rural areas are designated as Rural Service Areas ("RSA"). The FCC's rules and regulations provided for the licensing in each MSA and RSA of two competing cellular telephone systems, known as "Block A" and "Block B." Each operates pursuant to permits and licenses granted and approved by the FCC. (C. 102). The FCC designated Rockford, Illinois as an MSA. (C. 103). The Rockford Partnership holds the Block B license for the Rockford MSA. (C. 103.)

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[2]In July 1987, Contel Cellular Inc. transferred all its interest in the Rockford Partnership to Contel Cellular of Illinois, Inc. (C. 103-04.) Citations to the Record shall appear as "(C. _____)".

Originally, the Block B license was awarded to a company having a wireline (or landline) telephone presence in the service area, while the Block A license was awarded to an entity which was not a landline telephone company. (C. 102, 328-29). Although the wireline and nonwireline distinction is no longer used for licensing, the FCC rules and regulations prohibit an entity from holding an interest in both the Block B and Block A license in the same MSA or RSA. (C. 329-30, Supp. Rec. 78-79.)

On September 16, 1988, Contel filed an application with the FCC in the name of Contel Cellular Inc. to obtain an authorization to construct and a license to operate the Block B license for a cellular telecommunications system known as Illinois RSA 1.[3] On March 22, 1989, the FCC released to the public the names of the wireline applicants for May 25, 1989 lottery. (Supp. Rec. 167-69.) The eligible competing applicants were as follows:

1. Ameritech Mobile Communications Inc.
2. Contel Cellular Inc.
3. Alltel Mobile Communications of Illinois
4. GTE Mobilnet Incorporated
5. Leaf River Rural Cellular Telephone Co.
6. Centel Cellular Company

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[3]Illinois RSA 1 is sometimes referred to as "Illinois 1 - Jo Daviess" in some FCC documents. (Supp. Rec. 169.) It consists of the counties of Jo Daviess, Stephenson, Caroll, Ogle, De Kalb, Whiteside, and Lee, three of which adjoin the Rockford MSA. (C. 106.)

(Supp. Rec. 169.)

On May 26, 1989, the FCC announced that Contel was the winning applicant. Subsequently, Contel formed the Illinois RSA 1 Limited Partnership, (C. 106), in which it is the general partner. (Supp. Rec. 172.)

In September 1990, the FCC awarded Illinois RSA 1 Limited Partnership the FCC permit to construct a cellular system for Block B in Illinois RSA 1; in October of 1990, the FCC awarded to that partnership the license to operate the cellular system for Block B in Illinois RSA 1. (C. 106.) In December 1990, the FCC approved Contel's application to transfer its interest in the Illinois RSA 1 Limited Partnership to Contel of Illinois. (C. 107.) The Illinois RSA 1 Limited Partnership continues to provide telecommunications service in Illinois RSA 1 to the present day. Prior to FCC action on each of the applications the public was afforded the opportunity to object to FCC action. Respondents did not object to any of the actions taken by the FCC.

Illinois 01 Partners held the FCC license for the Block A, non-wireline license in competition with Contel in Illinois RSA 1. Sterling Resources Inc., was the majority partner in Illinois 01 Partners. In June of 1992, an application was made to the FCC to transfer the majority interest that Sterling Resources Inc. held in Illinois 01 Partners to United States Cellular Operating Co. ("USCOC") (Supp. Rec. 202-03.) USCOC was at the time and is now a wholly owned subsidiary of United States Cellular Corporation ("USCC"). (Supp. Rec. 211,

213, 226.) In turn, USCC was at the time and is now controlled by Telephone and Data Systems, Inc. ("TDS"); TDS owns 100 percent of that class of USCC's common stock which is entitled to elect five of USCC's seven directors. (Supp. Rec. 213, 224.)

In July 1993, USCOC filed an application with the FCC to transfer its interest (100 percent by this date) in Illinois 01 Partners to USCOC of Illinois RSA #1, Inc., which is a Virginia corporation and a wholly owned subsidiary of USCOC. (Supp. Rec. 214-215, 218.) TDS's recent annual report indicates that this application was granted. (Supp. Rec. 185.)

Further, TDS has a significant ownership interest in both respondents. Another subsidiary of TDS, through USCC, is United States Cellular Investment Company of Rockford ("USCIC Rockford") (Supp. Rec. 192.), which owns forty-nine percent of Central Cellular Telephones, Ltd. (C. 9), and forty percent of Leaf River Valley Cellular Telephone Co. (C. 130.)

Leaf River filed its complaint on May 24, 1994. (C. 122.) Central Cellular filed its complaint on May 25, 1994. (C. 1.) On June 24, 1994, Contel filed a motion to consolidate the two cases (C. 24-26), which the circuit court granted on June 29, 1994. (C. 27.)

The complaints both allege that Contel, as General Partner, was deemed to have filed an application in the lottery held by the FCC in the name of the Rockford MSA Partnership pursuant to paragraph 8.8 of the

Rockford Partnership Agreement. (A - 26, A - 38.) Because Contel did not transfer that application for Illinois RSA 1 to the Rockford MSA Partnership, Leaf River claims that Contel breached the partnership agreement and its fiduciary duty. (C. 8-12, 129-33.)

Respondents alleged that Contel "usurped" their "rights to provide cellular service in a neighboring area in Illinois." (A - 20, A - 32) Respondents also contend that petitioners "have seized unto themselves the profits to which the Partnership is entitled," (A - 21, A - 33) and "refus[ed] to share the fruits and benefits . . . and particularly to share the rights they have . . . gained to provide cellular service in Illinois RSA 1 . . . ." (A - 26, A - 38-39.)

Respondents further state in the complaints that they have not been and are not currently receiving their "proportionate share of the income" that is "generated by the cellular system in Illinois RSA 1, that properly belong[s] to the Partnership . . . ." (A - 26-27, A -39.) For their relief, respondents request that they receive "an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom by defendants" and "an injunction requiring defendants to share with the Partnership any and all benefits" to defendants' interest in Illinois RSA 1. (A - 27, A - 39.)

REASONS FOR GRANTING THE WRIT

This case raises an important question of constitutional law under the Supremacy Clause that warrants this Court granting review. The question presented draws into issue the relationship between state common law and the federal law of telecommunications as prescribed by Congress and the FCC. The assumption of jurisdiction by the state court undermines Sections 310 and 332 of the Communications Act. The state court relied heavily upon Section 414 of the Act. The relationship between Sections 310, 332 and 414 raise profound questions that should be addressed by this Court as to who should establish telecommunications policy.

(1). FCC Prohibition Against Cross-Block Ownership Precludes the State Court From Granting Relief.

Leaf River and Central Cellular have requested in their complaints that they be permitted to share control over the Illinois RSA 1 cellular system. However, if the state court were to grant the requested relief, it would do so in violation of federal law prohibiting the same or related entities having an interest, directly or indirectly, in both licenses in the same market.

The FCC issues two cellular licenses per market, known as the "Block A" license and the "Block B"

license.[4] The FCC prohibits, with limited exceptions not applicable here, ownership interests by a particular entity in both licenses in a given market. The FCC's regulation states that "[n]o person may have a direct or indirect ownership interest in licensees for both channel blocks in overlapping cellular geographic service areas ('CGSAs'), unless such interests pose no substantial threat to competition."[5] In addition, "[a] licensee, a person that owns a controlling interest in a licensee, or a person who actually controls a licensee" in either the Block A or Block B license may not own an ownership interest "in the licensee, a person that owns a controlling interest in a licensee, or a person that actually controls a license for the other frequency block in an overlapping CGSA."[6] The FCC's rule is designed to promote competition in the cellular industry, and to prevent cross-ownership of cellular competitors in the same market which would be deleterious to competition.[7]

Respondents improperly seek to share ownership in the cellular license in Block B of Illinois RSA 1 because they already own, *indirectly*, 100 percent of the

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[4]47 C.F.R. § 22.905.

[5]47 C.F.R. § 22.942.

[6]*Id.*

[7]*Amendment of Part 22 of the Commission's Rules*, 6 F.C.C.R. 6185, 6228 (1991). The FCC stated: "As we stated in the NPRM, in a service where only two cellular carriers are licensed per market, the licensee on one frequency block in a market should not own an interest in the other frequency block licensee in the same market."

Block A license in Illinois RSA 1. TDS owns 100 percent of the Block A license in Illinois RSA 1, through its 100 percent ownership of the voting stock of United States Cellular Corporation ("USCC"), which owns 100 percent of United States Cellular Operating Company of Illinois RSA #1, the licensee for the Block A license of Illinois RSA 1.

As the FCC's rule states, indirect ownership of one of the two cellular licenses in a market bars direct or indirect ownership in the other license in the same market.[8] Respondents' parent is the owner of the Block A license. Respondents are requesting that the state court grant them a measure of ownership over the Illinois RSA 1 Block B license. If the state court rules in respondents' favor, the state court will be doing so in violation of federal law, which prohibits respondents from holding an ownership interest in both licenses in Illinois RSA 1 simultaneously.[9] The purpose of the FCC regulation is the promotion of competition in the market. Ownership of both licenses in the same market is contrary to federal policy that existed well before the formal adoption of section 22.942.[10]

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[8]47 C.F.R. § 22.942.

[9]*See Id.*

[10]*In re Inquiry Into Use of Bands 825-845 MHz for Use of Cellular Communications Systems, Memorandum and Order on Reconsideration*, 89 F.C.C. 2d 58, 73 (1982) (recognizing FCC's longstanding policy of maintaining separate frequency block allocations in order to foster competition); *see also In re: Implementation of Sections 3(n) and 332*

In affirming state court jurisdiction, the appellate court relied heavily upon the saving clause for common law actions contained in the Communications Act.[11] However, as pointed out by this Court in *Morales v. Transworld Airlines,*[12] "a general `remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision . . . ."[13] Here the saving clause is being used to supersede FCC policy regarding dual ownership in the same market. That is in direct conflict with federal policy.[14] Because of the violation of FCC regulations and Section 310 of the Communications Act presented by respondents' prayers for relief, this is not a simple common law action in contract or tort that is preserved under Section 414. It is highly unlikely that the FCC would grant approval of a transfer that violates Section 22.942 of its regulations. The FCC has determined that permitting one entity to share in the ownership of both of the competing licenses in a market would not be in the public interest.[15] This results in a collision between FCC regulations and state law.

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of the Communications Act, Regulatory Treatment of Mobile Services, 8 F.C.C.R. 7988, 7999 (1993) *and* 9 F.C.C.R. 1411 (1994).

[11]47 U.S.C. § 414; (A-14).

[12]504 U.S. 374 (1992).

[13]*Id.* at 385.

[14]*See* 47 C.F.R. 22.942.

[15]*Amendment of Part 22 of the Commission's Rules,* 6 F.C.C.R. at 6228.

The Supremacy Clause of the Constitution states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."[16] The Supreme Court has interpreted the Supremacy Clause to mean that Congress, in accordance with its broad powers under the Commerce Clause of the Constitution, may override, or preempt, state law by passing federal legislation.[17] Federal agencies acting within the scope of their congressionally delegated authority may also preempt state law.[18]

Moreover, this Court has stated that preemption of state law occurs when a federal statute conflicts with state law, so that compliance with both laws is impossible. Congress also may preempt state law by issuing a comprehensive system of regulation, such that state law on the same subject would interfere with the objectives of Congress.[19] Each of these principles applies here.

Congress has expressly pre-empted the states in the Omnibus Budget Reconciliation Act ("OBR") where it

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[16]U.S. Const. art. VI, cl. 2.

[17]*California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 280-81 (1987).

[18]*City of New York v. FCC*, 486 U.S. 57, 63-64 (1988).

[19]*California Fed. Sav. and Loan Ass'n*, 479 U.S. at 280-81.

excluded "entry" regulation of which licensing is a part.[20] The thrust of the OBR is a comprehensive system of regulation of cellular by the FCC. As the FCC stated in its *Second Report and Order* implementing the OBR, "we believe the actions we take in this order establish a symmetrical regulatory structure that will promote competition in the mobile services marketplace and will thus serve the interests of consumers while also benefiting the national economy."[21] Furthermore, the FCC cross-block ownership regulation is in direct conflict with state action in this case.

State court jurisdiction in this case stands as an obstacle to Congressional purpose. If respondents are granted the relief that they seek in this case, such relief will have the effect of substituting state policy for federal policy. That collision compels this Court to grant the writ to clarify the issue.[22] Dual regulation of cellular telecommunications by the states and the FCC has been extinguished by Congress, leaving the FCC as the paramount authority establishing cellular policy.

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[20]47 U.S.C. § 332(c); 107 Stat. 312. Congress in section 332(c)(3) specifically excluded state regulation of cellular where sections 152(b) and 221(b) of the act are involved, thereby limiting the holding of *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355 (1986).

[21]*In re: Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994).

[22]*Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 581-82 (1981); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

(2). The FCC's Exclusive Jurisdiction Over The Transfer Or Sharing of Control of a Federal Communications License Precludes the State From Granting Relief.

This Court has declared that the grant, transfer, and revocation of communications licenses is "within the exclusive jurisdiction" of the FCC.[23] Such activity by a state court constitutes an attempt to "control the conduct of parties before the Communications Commission," and once a state had done so, it has "reached . . . into matters that do not belong to it."[24]

Through the Communications Act, Congress provided that no license, or any rights conferred by the license, may be transferred to any person without FCC approval. Section 310(d) of the Act states in relevant part:

> No . . . station license, *or any rights thereunder*, shall be transferred, assigned, or disposed of *in any manner*, voluntarily or *involuntarily*, *directly or indirectly*, . . . to any person *except upon application to the Commission* and upon finding by the Commission that the public interest, convenience,

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[23]*See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127-28, 130 (1945).

[24]*Id.* at 131.

and necessity will be served thereby . . . .[25]

The FCC has promulgated regulations with language similar to the Act, requiring that transfers of control be approved by the FCC.[26]

Respondents' claims, although labelled breach of contract and breach of fiduciary duty, are a camouflaged attempt to share ownership and control of the Illinois RSA 1 cellular system. Respondents, in their complaints, alleged that Contel "usurped" their "rights to provide cellular service in a neighboring area in Illinois." (A - 20, A - 32.) Respondents claim that they have not been, and are not receiving, their "proportionate share of the income" that is "generated by the cellular system in Illinois RSA 1, that properly belong[s] to the Partnership . . . ." (A - 26-27, A - 39.) Respondents further request that Contel be ordered to provide "an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom . . . ." (A - 27, A - 39.)

In the view of the FCC, the sharing of profits in a partnership constitutes an ownership interest in, and is an indicia of control over, a license.[27] "The right to share in the profits of a partnership is akin to an equity security which is generally regarded as entailing an ownership

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[25]47 U.S.C. § 310(d) (emphasis added).

[26]*See* 47 C.F.R. § 22.137.

[27]*Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

interest."[28] Receipt of monies and accounting of revenue from a communications system constitutes an indicia of control over the license. Only the FCC, through its approval process, may determine who participates in ownership of a license. Undisclosed partners owning five percent or more, unapproved by the FCC, violates FCC regulations. As stated previously, transfer of control of a license requires approval from the FCC.[29] This Court has held that a state court does not have jurisdiction to transfer control of a communications license from an FCC-approved licensee to a third party.[30]

The FCC's strong prohibitions against unapproved transfers of control present an insurmountable obstacle to the state court if it chooses to grant respondents' requested relief, namely, "an accounting of revenues generated by the cellular system in Illinois 1 and profits earned therefrom by [petitioners]." (A - 27, A - 39.) Not only would the state court violate the FCC's regulations, which require that the FCC make an independent determination of the public convenience and necessity of a transfer of control, but the state court would also act

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[28]*In re: Applications of Algreg Cellular Engineering, et al.*, 6 F.C.C.R. 2921 (Common Carr. Bur. 1991), *aff'd*, 9 F.C.C.R. 5098 (Rev. Bd. 1994) (appeal pending).

[29]*See* 47 U.S.C. § 310(d); 47 C.F.R. § 22.137; *Applications of Brian L. O'Neill*, 6 F.C.C.R. 2572, 2574-75 (1991) (forfeiture of $50,000 assessed by the FCC for transfer of control without FCC approval.)

[30]*Radio Station WOW*, 326 U.S. at 127-28.

wholly beyond its jurisdiction.

Although this Court has recognized the exclusivity of FCC jurisdiction over licensing, it has given some latitude to the state courts in *Radio Station WOW*[31] and *Regents of University System of Georgia v. Carroll*,[32] which now must be viewed against the dramatic changes that have occurred in the scope, size and complexity of telecommunications in this country since 1950. Congress has recognized and responded to these changes by expanding federal jurisdiction in amending the Communications Act in 1993 through the OBR. The need for nationwide uniformity in telecommunications regulation recognizes the fallibility of local intercession. The fracturing of jurisdiction over telecommunications policy to multiple decision makers is antithetical to a uniform national policy. Section 414 should not be interpreted to encourage that fracturing. Both *Radio Station WOW* and *Regents* involved local radio stations. In contrast, the instant case involves cellular telephone service which is part of the nationwide switched telephone network. Re-examination of principles enunciated in *Radio Station WOW* and *Regents* is needed to conform federal telecommunications law to today's environment and to achieve the Congressional objective of uniformity mandated by the OBR.

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[31]326 U.S. 120 (1945).

[32]338 U.S. 586 (1950).

This is not a garden variety contract or tort case. Respondents' requests for relief violate FCC policy and ask the state court to circumvent the requirements for obtaining FCC approval of matters clearly within the FCC's jurisdiction. Where a decision on a state law cause of action as a threshold matter requires an interpretation of federal licensing principles, the FCC has not ceded its decision making authority to the states.[33] Instead, the FCC has recognized that state laws applicable to such causes of action must yield when in conflict with federal policy.[34] Nor has this Court hesitated to pre-empt state court damages actions where the relief requested by a plaintiff would exceed that available under federal law or conflict with validly promulgated federal regulations.[35] If allowed to proceed, the state court could seriously undermine Section 310 of the Communications Act by substituting its judgment for that of the FCC as to ownership of the license and disrupt the FCC's licensing process.

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[33] *See In re: Clifford Heinz Stanton Trust*, 8 F.C.C.R. 973, 974 n.4 (Mobile Serv. Div. 1993) ("While it is proper for state courts to determine the existence of contractual agreements, the [FCC] ultimately must decide cross-ownership issues in accordance with its rules.")

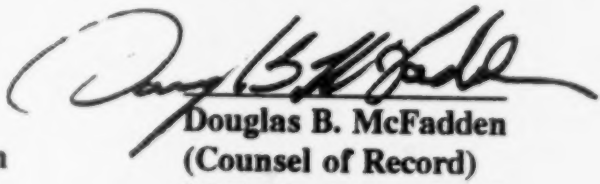
[34] *See Marlin Broadcasting of Central Florida, Inc. v. FCC*, 952 F.2d 507, 512 (D.C. Cir. 1992); *see also In re: Applications of Algreg Cellular Engineering*, 9 F.C.C.R. 5098, 5128 (Rev. Bd. 1994) (appeal pending).

[35] *Arkansas Louisiana Gas Co.*, 453 U.S. at 581-82; *see also City of New York v. FCC*, 486 U.S. 57 (1988) (local cable television technical standards pre-empted when in conflict with validly promulgated federal regulations).

CONCLUSION

Wherefore, petitioners, for the foregoing reasons, pray that this Court issue a writ of certiorari to review the decision of the Supreme Court of Illinois.

Respectfully submitted,



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A P P E N D I X

ΧΙΟΡΕΙΑ

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.,	)
Plaintiff,	)No. 94-CH-148)FILED)November 17, 1994
vs.	)CLERK,)RONALD KOTCHE
CONTEL CELLULAR, INC., a Delaware Corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois Corporation,	)
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

REPORT OF PROCEEDINGS from the decision rendered on the 12th day of October, 1994, before the HON. ALFORD R. PENNIMAN.

APPEARANCES:

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Attorney at Law

for the Plaintiff.

MR. JEFFERY M. CROSS
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for the Defendant.

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PROCEEDINGS

THE COURT: Well, just have a seat and I'll give you the grand decision This is 94-CH-148, Leaf River Valley Cellular Telephone Company, Inc. versus Contel Cellular, et al. And this comes on for ruling on the defendant's motion to dismiss. And their motion was filed on June 30th, 1994; motion was argued; and now I'll give you the decision.

The motion actually breaks up into three parts. The first part is what you might call preemption. And the argument made in the motion is that the federal law

preempts and, therefore, the case should not be heard in this court, et cetera and so forth.

Now, along that line we need to consult with two authorities. First authority is Centel Corporation and Sprint Corporation, and this is a written opinion in the Federal Communications Commission. It's in there, and it's cited at 8 FCC, says, Red Number Six, and it appears on Page 1829 of the Commission record. Introduction-- and this is released March 4th, 1993.

Introduction reads, "In this order we address applications filed jointly by Sprint Corporation, called "Sprint," and Centel Corporation, called "Centel," that seek the Commission's consent to transfer control to Sprint of common carrier radio authorizations held by Centel subsidiaries and affiliates. For reasons discussed below we grant the applications.

Background. On May 27th, 1992, Centel and Sprint entered into agreement and plan of merger to merge their companies through an exchange of stock valued at 2.85 billion. Thereafter on August 31st, 1992, the applications here before us were filed pursuant to Section 310(d) of the Communications Act of 1934, as amended. Under the proposed transaction Centel would become a wholly-owned subsidiary of Sprint. The merged company would have assets of 14 billion and estimated initial annual revenues of 10 billion."

Turning to Page 1831 in the Commission decision, continues this way. "Orwell contends that the applications for the proposed transfers of control should be denied because applicant's decision to merge violates the partnership agreements to which Orwell and a subsidiary

of Centel, TeleSpectrum, are signatories, and because Sprint has failed to demonstrate that it has the financial resources to operate the subject facilities for one year.

"Alternatively, if the applications are granted, Orwell requests that Sprint be required to maintain separate books of account for cellular and other operations in order to prevent it from improperly cross-subsidizing its rate regulated and other business activities, e.g., cellular telephone systems.

"Orwell's arguments are unavailing. First, the alleged violation of the partnership agreements amounts to a contractual dispute between Orwell and Centel, and therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them."

In addition, we have the decision of the Illinois Supreme Court in Kellerman versus MCI Telecommunications, cited at 112 Ill.2d 428 at page 443--starting at 443 anyway. The supreme court--Illinois Supreme Court says, quote, "We think the better view is that plaintiff's actions are not preempted by the Act. The subject matter of plaintiff's complaints involves neither the quality of defendant's service nor the reasonableness and lawfulness of its rates. Plaintiffs only allege that defendant disseminated fraudulent and deceptive advertisements concerning the cost of its long-distance telephone service.

"As such, plaintiffs seek to hold defendant to the same standards as they would any other business which advertises on a nationwide basis and which, in the course of its business, is subject to regulation from a number of federal and state agencies. Moreover, these actions do not present an obstacle to the accomplishment of the federal policy of promoting a rapid, efficient communication service with adequate facilities at reasonable charges. The prosecution of these claims will in no way interfere with the delivery of long-distance telephone service to defendant's customers, and any possible effect the litigation could have on defendant's telephone rates is speculative at best."

Alternatively--well, okay. "Finally, no federal statute or regulation has been brought to our attention which would expressly prohibit these actions. Therefore, we find that congress did not intend to occupy the field of interstate telephone service to the extent of barring these state-law claims for fraud, breach of contract, and deceptive practices, and hold that plaintiffs' actions are not preempted."

"Alternatively, defendant argues that the doctrine of primary jurisdiction requires these actions to be stayed pending review of the claims by the FCC. The doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. The doctrine provides that even when a court has jurisdiction over a matter, it should in some instances stay the judicial proceedings pending referral of the controversy, or a portion of it, to the administrative agency having expertise in the area."

There were many other cases and authorities cited, but I believe these are the two primary ones. The issue here is whether or not the lawsuit itself, Counts One and Two, is preempted; or, if it's not preempted, that basically the doctrine of primary jurisdiction should apply.

For the reasons stated in the FCC opinion, this is a matter that the FCC refers to the court of proper jurisdiction to resolve if it was a matter of enforcing the partnership contract. And, of course, that's what Counts One and Two are. Basically, the allegation is brought for the purpose of enforcing the alleged partnership agreement. Also, as is indicted in the FCC opinion, we do not apply the doctrine of primary jurisdiction because these are matters that are not resolved by the FCC.

So the first part of the motion to dismiss, preemption and primary jurisdiction, is heard and denied.

Second part. We discuss this other action pending in DeKalb County. It does not involve the same parties, does not involve the same transaction, and therefore 619-(a) (3) does not apply in this situation. Therefore, on that grounds the motion to dismiss is heard and denied.

Third and last issue which applies to Count Two of the complaint basically is the statute of limitations question of five years. The defendant claims the action accrued when the application was filed for the other territory in 1988. Of course this is at the time of the original filing and this is before the lottery drawing for the license. And they say that's when the statute should begin to run; and, therefore, since they filed in May of '94, they'd be barred.

The defendant was authorized to file for the license issues in the this lawsuit, but this lawsuit raises the point and it's brought because of defendant's alleged failure to share the profits from the other license operation, RSA 1, and it's not brought because of the filing of the application for a license or even the granting of the license in that actual sense.

Now, the critical exhibit here--and I've read through all the exhibits and all the briefs, and I must comment that this case is extremely well prepared and very good briefs written. What we get down to--and I've read through all the letters in sequence.

We get down to this letter of August 31st, 1989, signed by Laura E. Binion, corporation counsel for Contel. And this apparently was from corporate headquarters, Atlanta, Georgia. And I'm just going to read a couple of sentences out of her letter on the second page. This is actually a whole series of correspondence between Leaf River and Contel Cellular.

Quote, "If Contel and Leaf River Rural have not agreed upon terms of the partnership agreement by that time, Contel will have no choice under current FCC regulations but to request that the FCC issue the construction permit in Contel's name as lottery winner of this RSA. Contel's contractual obligations at that time will have to be worked out by all the parties."

And then here comes the punch line. Quote, "With respect to the letter received from Leaf River Cellular," which is the party in this case, "Contel does not believe it has any obligation to request that the FCC issue the license for the Illinois RSA 1 to the Rockford Partnership

and will not request the FCC to do so. I will be happy to discuss these matters with you at your convenience. Sincerely," signed Laura Binion, corporate counsel.

In the opinion of this court that is when the statute of limitations time began and that's when the cause of action accrued, is when the plaintiff here was advised by the defendant that no way was this license going to be for the benefit of the Rockford partnership, but would be the property of Contel Cellular itself, which, of course, is what this whole cause of action is about.

Therefore, I find that that, under what's been presented so far anyway, is when the statute of limitations would begin to run, August 31st, 1989. Since this action was filed in, I believe, May of '94, the filing was timely. Therefore, for that reason motion to dismiss is heard and denied.

However, since this is a 619 motion, it's 619-(a)(5), I will allow, if the defendant so wishes, the defendant to plead over just as an affirmative defense in their pleadings. And they can do that within 21 days.

Otherwise, in summary, motion to dismiss heard and denied.

Any questions?

See order.

MS. ROACH: Your Honor, in the preparatory remarks to your decision you indicated that it related to the lawsuit brought by Leaf River against Contel. There's actually a companion case.

THE COURT: Well, I was referring to both--

MS. ROACH: Okay.

THE COURT: --at the same time.

MS. ROACH: Okay.

THE COURT: I've actually consolidated these two cases for the purpose of these procedures. And, therefore, when I speak of one, I speak of the other.

THIS ORDER IS NOT PRECEDENTIAL
AND IS NOT TO BE CITED

No. 2-94-1303

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.,	)Appeal from the Circuit)Court of Winnebago County)))
Plaintiff-Appellee,	)No. 94-CH-148)No. 94-CH-151)
v.	))
CONTEL CELLULAR INC. AND CONTEL CELLULAR OF ILLINOIS,	))))Filed)March 21 1995
Defendants-Appellants,	)LOREN J. STROTZ,)CLERK)APPELLATE COURT
and	)2nd DISTRICT)
ROCKFORD MSA LIMITED PARTNERSHIP,	))))

Nominal Defendant.	)
	)
CENTRAL CELLULAR TELEPHONES, LTD.,	)
Plaintiff-Appellee,	)
CONTEL CELLULAR INC. and CONTEL CELLULAR OF ILLINOIS,	)
Defendants-Appellants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP,	)
Nominal Defendant.	)Honorable)Alford R. Penniman,)Judge, Presiding.

No. 2-94-1303

RULE 23 ORDER

The FCC has divided the nation into service areas for the purpose of regulating the provision of cellular phone service. Urban areas are called MSAs

(Metropolitan Service Areas), and non-urban areas are called RSAs (Rural Service Areas). The FCC issues two licenses, a Block A license and a Block B license, in each service area and prohibits a single entity from having control of both licenses in a single area.

Defendants, Contel Cellular Inc. and Contel Cellular of Illinois, bring the present interlocutory appeal from the order of the circuit court of Winnebago County denying their motions to dismiss for lack of subject matter jurisdiction and to stay the circuit court proceedings, pending action before the Federal Communications Commission (FCC). We affirm.

The parties are corporations and partnerships engaged in, among other things, providing cellular phone service in the vicinity of Rockford, Illinois. Plaintiffs, Leaf River Valley Cellular Telephone Company (owned by Leaf River Telephone Co. and United States Cellular Investment Company of Rockford) and Central Cellular Telephones, Inc., are limited partners in Rockford MSA Limited Partnership (RMSA, the nominal defendant). RMSA holds a Block B license to provide cellular service in the Rockford metropolitan service area.

Defendant Contel Cellular, Inc. (which now owns all interest in RMSA previously owned by defendant Contel Cellular of Illinois, Inc.) is both a limited partner and the general partner in RMSA. Ameritech Mobile Communications, Inc. (a non-party) is also a limited partner in RMSA.

Defendants are also the general partner in Illinois RSA 1 Limited Partnership (IRSA). IRSA applied for

and obtained a Block B license to serve rural northwest Illinois. Plaintiffs sued defendant (in separate suits consolidated by the trial court), alleging that the action of obtaining the rural Block B license through IRSA constituted a breach of contract and a breach of defendant's fiduciary duty to them.

Defendants moved for dismissal for lack of subject matter jurisdiction, claiming that federal law preempted a decision by a state court. Defendants also moved to stay the circuit court action, pending a decision by the FCC. The trial court denied these motions, and defendants appeal.

Appeal from the denial of the motion to stay the proceedings is permitted pursuant to Supreme Court Rule 307(a)(1). (Official Reports Advance Sheet No. 26 (December 22, 1993), R. 307(a)(1), eff. Feb. 1, 1994; see also Metropolitan Sanitary District v. United States Steel Corp. (1975), 30 Ill. App. 3d 360, 361). Interlocutory appeal on the issue of preemption is permitted if the issue is certified to the appellate court by the trial court. (Supreme Court Rule 308 (Official Reports Advance Sheet No. 26 (December 22, 1993), R. 308, eff. Feb. 1, 1994).) The trial court did not rule on defendants' Rule 308 motion prior to this appeal. However, because the preemption argument challenges the court's jurisdiction to deny the stay, we will address that issue notwithstanding the noncompliance with Rule 308. See Kellerman v. MCI Telecommunications Corp. (1986), 112 Ill. 2d 428.

Defendants contend that the trial court erred in finding that plaintiffs' claims are not preempted by the Communications Act of 1934 (47 U.S.C.A. § 301, et seq. (1991)) and the Omnibus Budget Reconciliation Act of

1993 (OBRA) (P.L. 103-66 (August 10, 1993)). Preemption of state action by federal law can occur under three circumstances: (1) Congress can expressly preempt state action by stating the intent to preempt in the language of a federal enactment; (2) congressional intent to preempt state action may be inferred where the scheme of federal regulation is sufficiently comprehensive; and (3) where state and federal law conflicts in an area regulated by federal law, the state action will be nullified. (Hillsborough County v. Automated Medical Laboratories, Inc. (1985), 471 U.S. 707, 713, 85 L. Ed. 2d 714, 721, 105 S. Ct. 2371, 2375.) Federal law will preempt state law only where a court finds that preemption was "the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp. (1947), 331 U.S. 218, 230, 91 L. Ed. 1447, 1459, 67 S. Ct. 1146, 1152.

Defendants claim that all three circumstances are present in this case, so that this action is preempted be federal law. The Communications Act does not expressly preempt state action. The Act provides that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." (47 U.S.C.A. § 414 (1991).) This language does not support an inference of preemption. See Kellerman, 112 Ill. 2d at 443.

Defendants argue that a decision by the trial court in this dispute would conflict with federal law, and therefore federal law preempts the matter in dispute. Defendants argue that in order to resolve this dispute, the court might have to transfer to plaintiffs control of the license at issue. A state court does not have jurisdiction to transfer control of a communications license from an

FCC -approved licensee to a third party. (Radio Station WOW v. Johnson (1945), 326 U.S. 120, 127-28, 89 L. Ed. 2092, 2099, 65 S. Ct. 1475, 1480.) Plaintiffs, however, have not asked the trial court to transfer control of the license. They seek only compensatory damages from defendants for their offenses as general partners, specifically (1) seizing a partnership opportunity for themselves and (2) breach of the provision of the partnership agreement which requires that if the general partner applies for a license to serve another service area, the application shall be on behalf of the partnership. No decision on either of these issues would require the trial court to tread on FCC powers or responsibilities.

Defendants allege that plaintiffs seek an ownership interest in the Block B license defendants obtained for Illinois RSA #1. They assert that by granting such an interest the trial court would cause a violation of 47 C.F.R. § 22.902(b)(5) (1994), a regulation that prohibits direct or indirect ownership by a single entity of both the Block A and the Block B licenses in one service area. Defendants argue that indirect ownership of both licenses in Illinois RSA #1 would occur if plaintiffs succeed in this case, because United Stated Cellular Investment Company of Rockford, a company that owns 49% of plaintiff Leaf River Valley and 40% of plaintiff Central Cellular, is entirely owned by United States Cellular Corporation, a company that owns the Block A license in Illinois RSA #1 through a subsidiary. If plaintiffs win control of the Block B license, defendants argue, then United States Cellular Corporation would indirectly control both licenses in Illinois RSA #1.

Plaintiffs maintain that they seek neither an ownership interest in nor control over, the Block B

license. They want only the damages for which they have sued.

Defendants assert that plaintiffs really do want an ownership interest, but they sued for damages because they know they could not lawfully obtain an ownership interest in the license. Defendants also contend that damages paid out of the profits from the license would comprise an ownership interest. Defendants assert that the sharing of profits in a partnership an the receipt of an accounting of revenue (the relief specifically sought in the complaint) constitute an ownership interest in a partnership.

The right to share in profits is generally considered an indicia of control. (See Greil v. Travelodge International, Inc. (1989), 186 Ill. App. 3d 1061, 1068.) This rule pertains to whether plaintiffs are entitled to the relief sought, not to whether the court has jurisdiction to hear the matter. Any of these arguments might be posed as affirmative defenses to the relief sought, but they do not present impediments to the trial court's jurisdiction. There is no actual conflict between the Communications Act and the action brought by plaintiffs.

Defendants have cited no express preemption of the present action in OBRA; nor has our research revealed such language. Defendants cite to 47 U.S.C.A. § 332(C)(3)(A) (Supp. 1994), a section of OBRA that prohibits state regulation of "the entry of or the rates charged by any commercial mobile service ***." (47 U.S.C. § 332(c)(3)(A) (Supp. 1994).) As that section of OBRA is totally irrelevant to the substance of the present case, we must assume that defendant infers total preemption of state action from this language.

We do not agree with that interpretation. Nothing in OBRA expressly or impliedly preempts the adjudication of the claims brought by plaintiffs. Nor did we find any conflict between OBRA and the possible results of this litigation.

The FCC has repeatedly refused to rule on private contractual disputes, deferring these matters to resolution in the courts. (In re Applications of Decatur Telecasting, Inc. (1992), 7 F.C.C.R. 8622, ¶ 12; In re Applications of Wind N' Sea FM Limited Partnership (1992), 7 F.C.C.R. 2293, 2294, n.5; In re Applications of KQED, Inc. (1991), 6 F.C.C.R. 625, ¶ 13.) Despite the fact that plaintiffs may not be entitled to the relief they seek, they are nevertheless entitled to litigate the matter in a court of law. The trial court clearly has jurisdiction to hear these matters, and it therefore properly denied defendants' motion to dismiss.

Defendants' final contention, that the trial court erred in denying the motion to stay proceedings pending a decision by the FCC, is meritless. As noted above, the FCC does not adjudicate private contract disputes. (Wind N' Sea, 7 F.C.C.R. at 2294, n.5.) Furthermore, there is no action pending before the FCC in this matter.

For the foregoing reasons, we affirm the order of the circuit court of Winnebago County denying defendants' motions to dismiss and to stay.

Affirmed.

INGLIS, J., with GEIGER and HUTCHINSON, JJ., concurring.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL 62706
(217) 782-2035

October 4, 1995

Mr. Peter E. Carlson
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No. 79010 - Leaf River Valley Cellular Telephone Co., Inc., et al., respondents, v. Contel Cellular Inc., et al., petitioners. Leave to appeal. Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 26, 1995.

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL COURT OF ILLINOIS, WINNEBAGO COUNTY

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.	))RECEIVED)MAY 26 1994)FILED
Plaintiff,	)MAY 24 1994)RONALD KOTCHE
vs.	)Clerk of the)Circuit Court
CONTEL CELLULAR, INC., a Delaware corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois corporation,	)WINNEBAGO COUNTY,)ILLINOIS)))No. 94-CH-148)
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

COMPLAINT

Plaintiff Leaf River Valley Cellular Telephone Co.,

Inc. ("Leaf River"), by its attorneys, states as follows for its complaint against Contel Cellular, Inc. ("Contel") and Contel Cellular of Illinois, Inc. ("Contel of Illinois" or the "General Partner"):

NATURE OF THE ACTION

1. Plaintiff Leaf River brings this action to obtain relief for actions taken by defendants in violation of their contractual and fiduciary duties to the Rockford MSA Limited Partnership (the "Partnership") and the limited partners therein. Leaf River is a limited partner and Contel, through its wholly-owned subsidiary Contel of Illinois, is the general partner of the Partnership. The Partnership provides cellular telecommunications service in Rockford, Illinois and the surrounding area. Defendants have usurped for themselves the rights to provide cellular service in a neighboring area in Illinois, without sharing those opportunities with the Partnership, in violation of the partnership agreement and their fiduciary obligations.

2. This action is brought individually by the plaintiff and as a derivative action pursuant to 805 ILCS 210/1101.

3. Leaf River has been a limited partner at all times relevant to the matters complained of herein.

4. Any effort to cause the General Partner to bring this action would be futile and not likely to succeed. This action alleges breaches of the partnership agreement and of fiduciary duties by Contel of Illinois, the sole General Partner of the Partnership, and by the General Partner's sole shareholder, Contel. These defendants'

unlawful actions have financially benefitted Contel. Specifically, Contel and Contel of Illinois have obtained the permit and license to construct and operate a cellular telephone system that adjoins the Rockford MSA. Contel and Contel of Illinois have operated and continue to operate this system for their own benefit and have financially profited from the operation of this systems. The rights to own and operate this system and reap the financial rewards thereof belong to the Partnership. Demand has been made on Contel to honor its obligations to the Partnership, but it has refused to do so. Indeed, Defendants have continued to wrongfully deprive the Partnership of those rights and have seized unto themselves the profits to which the Partnership is entitled. Contel thereby has a substantial financial interest with respect to the actions complained of herein. Similarly, Contel of Illinois, like its parent, is neither financially disinterested nor independent with respect to the transactions challenged in the complaint. For these reasons, any further effort to cause the General Partner to bring this action would be futile and not likely to succeed.

PARTIES AND JURISDICTION

5. Leaf River is a corporation organized under the laws of the State of Illinois. Leaf River is engaged in the business of, inter alia, owning a limited partnership interest in a cellular telecommunications system in Rockford, Illinois.

6. Contel is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in Atlanta, Georgia. Among other business activities, Contel is engaged in the business of providing

cellular, telecommunications service.

7. Contel of Illinois is a corporation incorporated under the laws of the State of Illinois, with its principal place of business in Sycamore, Illinois. Contel of Illinois is engaged in the business of owning and operating a cellular telecommunications system in Rockford, Illinois.

8. Venue is proper in this County pursuant to Ill. Rev. State. ch. 110, ¶¶ 2-101 and 2-102 since defendant is doing business in this County.

BACKGROUND

9. The Federal Communications Commission ("FCC") regulates the cellular telecommunications industry in the United States. As one aspect of that regulation, the FCC has divided the United States into defined geographic service areas or markets for purposes of providing cellular telephone service to the public. The more urban areas served are called Metropolitan Statistical Areas ("MSAs"), while the more rural areas are called Rural Service Areas ("RSAs"). Each MSA is typically surrounded by and adjoins several RSAs.

10. Under the FCC's rules and regulations, each service area is to have two cellular telephone systems, each constructed and operated pursuant to permits and licenses granted by the FCC. For each service area, the FCC awards the authorization to construct and operate one cellular system to a telephone company having a wireline presence in the area ("wireline operator"), and awards the authorization to construct and operate the other cellular system to an entity which is not a telephone

company ("non-wireline operator"), selecting among those entities submitting applications for that particular area.

CELLULAR SERVICE IN THE ROCKFORD MSA

11. The Rockford, Illinois cellular service area has been designated by the FCC as an MSA (the "Rockford MSA"). Several RSAs adjoin the Rockford MSA, including Illinois RSA 1.

12. On or about May 27, 1986, the Rockford MSA Limited Partnership (the "Partnership") was formed and a limited partnership agreement was executed (the "Partnership Agreement") by Contel, Leaf River, Ameritech Mobile Communications, Inc. ("Ameritech") and Central Cellular Telephones, Ltd. ("Central Cellular"). The partnership was formed for the purpose of funding, establishing and providing cellular telecommunications service in and around Rockford, Illinois.

13. On or about January 30, 1987, the Partnership received the FCC permit to construct a cellular system in the Rockford MSA. On or about November 5, 1987, the Partnership received the FCC license to operate a cellular system in the Rockford MSA.

14. The Partnership is a limited partnership organized under the laws of the State of Illinois, in which Contel of Illinois is the General Partner and a limited partner, holding a 35% general partnership interest and a 24% limited partnership interest (Contel transferred its interest in the Partnership to Contel of Illinois on or after July 9, 1987), Central Cellular is a limited partner, holding a 20% limited partnership interest, Leaf River is a limited

partner, holding a 20% limited partnership interest, and Ameritech is a limited partner, holding a 1% limited partnership interest.

15. Although Contel of Illinois is nominally the General Partner of the Partnership, its parent Contel executed the Partnership Agreement and at all times pertinent hereto has retained ultimate control of the Partnership. Contel therefore has certain contractual and fiduciary obligations to the Partnership and its limited partners.

CELLULAR SERVICE IN ADJOINING AREAS

16. Pursuant to Section 8.8 of the Partnership Agreement, any application by Contel or an affiliate thereof to provide cellular service in areas adjoining the Rockford MSA is to be made on behalf of the Partnership. Section 8.8 of the Partnership Agreement provides in pertinent part as follows:

> 8.8 Cellular Service in Other Areas.
> . . . Applications by the General Partner or an Affiliate thereof to provide Cellular Service in areas adjoining the MSA shall be deemed to be made on behalf of the Partnership pursuant to the terms of Section 7.2(f).

17. Section 7.2(f) of the Partnership Agreement vests Contel of Illinois with the power to make on behalf of the Partnership applications to provide cellular service in areas adjoining the Rockford MSA.

18. Contel made an application to provide, and

its affiliate Contel of Illinois, is providing, cellular service in an RSA which adjoins the Rockford MSA, but they have refused and continue to refuse, despite repeated demands made on behalf of the plaintiff, to acknowledge that Contel's application should have been made on behalf of the Partnership.

19. On or about September 21-23, 1988, Contel filed an application with the FCC to obtain an authorization to construct and license to operate a cellular telecommunications system in Illinois RSA 1, which adjoins the Rockford MSA. Contel filed this application on its own behalf. Under the plain language of the Partnership Agreement, however, this application should have been made on behalf of the Partnership.

20. On or about May 26, 1989, the FCC announced that Contel was the winning applicant for the Illinois RSA 1 service area. Upon information and belief, shortly thereafter, Contel formed the Illinois RSA 1 Limited Partnership, of which Contel was (and Contel of Illinois now is) the General Partner, holding a 91.5% ownership interest, for the purpose of providing cellular service in Illinois RSA 1.

21. On or about September 17, 1990, Illinois RSA 1 Limited Partnership received the FCC permit to construct a cellular system in Illinois RSA 1. On or about October 9, 1990, Illinois RSA 1 Limited Partnership received the FCC license to operate a cellular system in Illinois RSA 1.

22. On or about November 19, 1990, Contel filed an application with the FCC to transfer its interest in Illinois RSA 1 to Contel of Illinois, which was granted on

December 5, 1990.

COUNT I - BREACH OF PARTNERSHIP AGREEMENT

1-22. Plaintiff realleges and incorporates by reference herein paragraphs 1-22 above as paragraphs 1-22 of this Count I.

23. Under Section 8.8 of the Partnership Agreement, Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership, because Illinois RSA 1 is an area adjoining the Rockford MSA.

24. Despite repeated demands by United States Cellular Investment Company of Rockford ("USCIC Rockford"), which owns a 40% interest in Leaf River, Contel and Contel of Illinois have willfully failed and refused to acknowledge that Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership or to share the benefits of the rights they ultimately received, through approval of that application, to provide cellular service in Illinois RSA 1 with the Partnership.

25. By refusing to acknowledge that Contel's application to provide cellular service in Illinois RSA 1 should have been made on behalf of the Partnership, and by refusing to share the fruits and benefits of that application with the Partnership, and particularly to share the rights they have thereby gained to provide cellular service in Illinois RSA 1, Contel and Contel of Illinois have breached the Partnership Agreement.

26. Leaf River has been and continues to be damaged by Contel's and Contel of Illinois' breach of the Partnership Agreement, in that it has not been and is not receiving its proportionate share of the income and business opportunities generated by the cellular system in Illinois RSA 1, that properly belong to the Partnership but that have been usurped by Contel and Contel of Illinois for themselves alone.

WHEREFORE, plaintiff Leaf River request that the Court enter judgment in favor of Leaf River and against defendants, and award the following relief:

a. an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom by defendants;

b. an injunction requiring defendants to share with the Partnership any and all benefits attributable to defendants' interest in Illinois RSA 1;

c. compensatory damages in an amount to be determined at trial;

d. reasonable expenses, including reasonable attorney's fees as provided by 805 ILCS 210/1004; and

e. such other and further relief as the Court deems just and appropriate.

COUNT II - BREACH OF FIDUCIARY DUTY

1-26. Plaintiff realleges and incorporates by reference herein paragraphs 1-26 of Count I as paragraphs 1-26 of this Count II.

27. Contel and Contel of Illinois, by virtue of their status and actions as General Partner and holder of the majority interest in the Partnership, owe a duty of loyalty and other fiduciary duties to Leaf River and the Partnership.

28. The opportunity to provide cellular service in Illinois RSA 1 was an opportunity belonging to the Partnership, but was usurped by defendants for themselves alone.

29. Despite repeated demands by USCIC Rockford, defendants have willfully failed and refused to share their right to provide cellular service in Illinois RSA 1 with the Partnership.

30. In making an application to provide cellular service in Illinois RSA 1 solely on their own behalf, and retaining the rights obtained solely for their own benefit and refusing to share them with the Partnership or its limited partners, defendants acted in bad faith.

31. By usurping for themselves the valuable right to provide cellular service in Illinois RSA 1, defendants have breached their fiduciary duties to the

Partnership and plaintiff Leaf River.

WHEREFORE, plaintiff Leaf River requests that the Court enter judgment in favor of Leaf River and against defendants, and award the following relief:

a. an accounting of revenues generated by the cellular system in Illinois RSA 1 and profits earned therefrom by defendants;

b. an injunction requiring defendants to share with the Partnership any and all benefits attributable to defendants' interest in Illinois RSA 1;

c. compensatory damages in an amount to be determined at trial;

d. reasonable expenses, including reasonable attorney's fees, as provided by 810 ILCS 210/1004;

e. punitive damages in an amount to be determined at trial; and

f. such other and further relief as the Court deems just and appropriate.

Plaintiff demands trial by jury on all counts.

Respectfully submitted,

By: /s/ Steven W. Young
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Valley Telephone Co., Inc.

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**IN THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL COURT
OF ILLINOIS, WINNEBAGO COUNTY**

CENTRAL CELLULAR TELEPHONES, LTD., an Illinois corporation,	)
Plaintiff,	)FILED)MAY 25 1994)RONALD KOTCHE
vs.	)Clerk of the)Circuit Court
CONTEL CELLULAR, INC., a Delaware corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois corporation,	)WINNEBAGO COUNTY,)ILLINOIS)))No. 94-CH-151
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

COMPLAINT

Plaintiff Central Cellular Telephones, Ltd. ("Central Cellular"), by its attorneys, states as follows for its complaint against Contel Cellular, Inc. ("Contel") and Contel Cellular of Illinois, Inc. ("Contel of Illinois" or the "General Partner"):

NATURE OF THE ACTION

1. Plaintiff Central Cellular brings this action to obtain relief for actions taken by defendants in violation of their contractual and fiduciary duties to the Rockford MSA Limited Partnership (the "Partnership") and the limited partners therein. Central Cellular is a limited partner and Contel, through its wholly-owned subsidiary Contel of Illinois, is the general partner of the Partnership. The Partnership provides cellular telecommunications service in Rockford, Illinois and the surrounding area. Defendants have usurped for themselves the rights to provide cellular service in a neighboring area in Illinois, without sharing those opportunities with the Partnership, in violation of the partnership agreement and their fiduciary obligations.

2. This action is brought individually by the plaintiff and as a derivative action pursuant to 805 ILCS 210/1101.

3. Central Cellular has been a limited partner at all times relevant to the matters complained of herein.

4. Any effort to cause the General Partner to bring this action would be futile and not likely to succeed.

This action alleges breaches of the partnership agreement and of fiduciary duties by Contel of Illinois, the sole General Partner of the Partnership, and by the General Partner's sole shareholder, Contel. These defendants' unlawful actions have financially benefitted Contel. Specifically, Contel and Contel of Illinois have obtained the permit and license to construct and operate a cellular telephone system that adjoins the Rockford MSA. Contel and Contel of Illinois have operated and continue to operate this system for their own benefit and have financially profited from the operation of this systems. The rights to own and operate this system and reap the financial rewards thereof belong to the Partnership. Demand has been made on Contel to honor its obligations to the Partnership, but it has refused to do so. Indeed, Defendants have continued to wrongfully deprive the Partnership of those rights and have seized unto themselves the profits to which the Partnership is entitled. Contel thereby has a substantial financial interest with respect to the actions complained of herein. Similarly, Contel of Illinois, like its parent, is neither financially disinterested nor independent with respect to the transactions challenged in the complaint. For these reasons, any further effort to cause the General Partner to bring this action would be futile and not likely to succeed.

PARTIES AND JURISDICTION

5. Central Cellular is a corporation organized under the laws of the State of Illinois. Central Cellular is engaged in the business of, inter alia, owning a limited partnership interest in a cellular telecommunications system in Rockford, Illinois.

6. Contel is a corporation incorporated under the laws of the State of Delaware, with its principal place of business in Atlanta, Georgia. Among other business activities, Contel is engaged in the business of providing cellular, telecommunications service.

7. Contel of Illinois is a corporation incorporated under the laws of the State of Illinois, with its principal place of business in Sycamore, Illinois. Contel of Illinois is engaged in the business of owning and operating a cellular telecommunications system in Rockford, Illinois.

8. Venue is proper in this County pursuant to Ill. Rev. State. ch. 110, ¶¶ 2-101 and 2-102 since defendant is doing business in this County.

BACKGROUND

9. The Federal Communications Commission ("FCC") regulates the cellular telecommunications industry in the United States. As one aspect of that regulation, the FCC has divided the United States into defined geographic service areas or markets for purposes of providing cellular telephone service to the public. The more urban areas served are called Metropolitan Statistical Areas ("MSAs"), while the more rural areas are called Rural Service Areas ("RSAs"). Each MSA is typically surrounded by and adjoins several RSAs.

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one cellular system to a telephone company having a wireline presence in the area ("wireline operator"), and awards the authorization to construct and operate the other cellular system to an entity which is not a telephone company ("non-wireline operator"), selecting among those entities submitting applications for that particular area.

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11. The Rockford, Illinois cellular service area has been designated by the FCC as an MSA (the "Rockford MSA"). Several RSAs adjoin the Rockford MSA, including Illinois RSA 1.

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24% limited partnership interest (Contel transferred its interest in the Partnership to Contel of Illinois on or after July 9, 1987), Central Cellular is a limited partner, holding a 20% limited partnership interest, Central Cellular is a limited partner, holding a 20% limited partnership interest, and Ameritech is a limited partner, holding a 1% limited partnership interest.

15. Although Contel of Illinois is nominally the General Partner of the Partnership, its parent Contel executed the Partnership Agreement and at all times pertinent hereto has retained ultimate control of the Partnership. Contel therefore has certain contractual and fiduciary obligations to the Partnership and its limited partners.

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service in Illinois RSA 1, Contel and Contel of Illinois have breached the Partnership Agreement.

26. Central Cellular has been and continues to be damaged by Contel's and Contel of Illinois' breach of the Partnership Agreement, in that it has not been and is not receiving its proportionate share of the income and business opportunities generated by the cellular system in Illinois RSA 1, that properly belong to the Partnership but that have been usurped by Contel and Contel of Illinois for themselves alone.

WHEREFORE, plaintiff Central Cellular requests that the Court enter judgment in favor of Central Cellular and against defendants, and award the following relief:

a. an accounting of revenues generated by the cellular system in Illinois RSA I and profits earned therefrom by defendants;

b. an injunction requiring defendants to share with the Partnership any and all benefits attributable to defendants' interest in Illinois RSA 1;

c. compensatory damages in an amount to be determined at trial;

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attorney's fees as provided by 805 ILCS 210/1004; and

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30. In making an application to provide cellular service in Illinois RSA 1 solely on their own behalf, and retaining the rights obtained solely for their own benefit and refusing to share them with the Partnership or its limited partners, defendants acted in bad faith.

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f. such other and further relief as the Court deems just and appropriate.

Plaintiff demands trial by jury on all counts.

Respectfully submitted,

By: /s/ Steven W. Young
Attorneys for Central Cellular Telephones Telephones, Ltd.

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One First National Plaza
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PRIOR TEXT OF PART 22 RULES

47 C.F.R. § 22.39:

> (a) Approval required. Authorizations shall be transferred or assigned to another party, voluntarily (for example, by contract) or involuntarily (for example, by death, bankruptcy, or legal disability), directly or indirectly or by transfer of control of any corporation holding such authorization, only upon application and approval by the Commission.
>
> > (1) A change from less than 50% ownership to 50% or more ownership shall always be considered a transfer of control.
> >
> > (2) In other situations a controlling interest shall be determined on a case-by-case basis considering the distribution of ownership, and the relationships of the owners, including family relationships.

47 C.F.R. § 22.902:

> (a) . . . Each frequency Block available for use by cellular systems in this service shall be assigned to a single applicant in any cellular system service area . . . . Only two cellular systems may be authorized in each such area.
>
> (b) For cellular systems the assignment of frequencies will be divided into two blocks. Assignments will be made from the frequencies listed for cellular systems A and B. For initial applications for MSAs and RSAs, common carriers

not also engaged in the business of affording public landline message telephone service will be assigned frequencies from Cellular System A. Common carriers engaged directly or indirectly in the business of affording public landline message telephone service will be assigned frequencies for Cellular System B in those areas in which they provide such landline service in some portion of the cellular market, for initial applications for MSAs and RSAs.

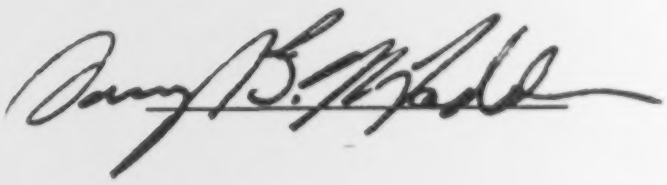
(5) Ownership of Cellular Systems. No person may have a direct or indirect ownership interest in licenses for both frequency blocks in overlapping CGSAs, unless such interests pose no substantial threat to competition. A licensee, a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for one frequency in a CGSA may not own any direct or indirect ownership interest in the licensee a person who owns a controlling interest in a licensee, or a person who actually controls a licensee for the other frequency block in an overlapping CGSA.

(ii) Divestiture of interests as a result of a transfer of control or assignment must occur prior to consummating the transfer or assignment.

CERTIFICATE OF SERVICE

I, Douglas B. McFadden, hereby certify that on this 8th day of December, 1995, three true and correct copies of the foregoing "Petition for Writ of Certiorari" were served by first class U.S mail, postage prepaid, upon the following opposing counsel:

David F. Graham
Kathleen L. Roach
Steven W. Young
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603



Supreme Court, U.S.
FILED
JAN 24 1996
CLERK

No. 95-908

In The

Supreme Court of the United States

October Term, 1995

CONTEL CELLULAR INC. AND CONTEL CELLULAR OF ILLINOIS, INC.,

Petitioners,

v.

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC. AND CENTRAL CELLULAR TELEPHONES, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The Illinois Appellate Court

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction to review an interlocutory order of a state appellate court where the matter remains to be tried in the lower state court and no relief has yet been granted, because some of the relief that might be awarded after trial might implicate federal regulations.

2. Whether an Illinois state court has the power to adjudicate damage claims under Illinois law for breach of a contract and breach of the fiduciary duty owed by the general partner of an Illinois limited partnership, where the claims pertain to a business that operates under FCC licenses.

LIST OF AFFILIATED CORPORATIONS

Pursuant to Supreme Court Rule 29.6, the following is a list of the parent corporations and non-wholly owned subsidiaries of each respondent:

Leaf River Valley Cellular Telephone Co., Inc. ("Leaf River"): Leaf River Telephone Company owns 51% of the stock of Leaf River Cellular. United States Cellular Investment Company of Rockford ("USCIC Rockford") owns 49% of the stock of Leaf River Cellular. United States Cellular Investment Company ("USCIC") is the parent corporation of USCIC Rockford. United States Cellular Company ("USCC"), a publicly traded corporation, is the parent corporation of USCIC. Telephone and Data Systems, a publicly traded corporation, owns approximately 80% of the shares of USCC. Leaf River has no non-wholly owned subsidiaries.

Central Cellular Telephones, Ltd. ("Central Cellular"): Sharon Telephone Company owns 25.5% of the stock of Central Cellular. Bergen Telephone Company owns 25.5% of the stock of Central Cellular. USCIC Rockford owns 49% of the stock of Central Cellular. Central Cellular has no non-wholly owned subsidiaries.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Leaf River Valley Cellular Telephone Company, Inc. ("Leaf River") and Central Cellular Telephones, Ltd. ("Central Cellular") respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioners Contel Cellular Inc. and Contel Cellular of Illinois, Inc. (collectively "Contel") seeking review of the decision of the Illinois Appellate Court.[1]

JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to hear the Petition under 28 U.S.C. § 1257 because the order denying petitioners' interlocutory appeal was not a final judgment or decree.

STATUTES INVOLVED

28 U.S.C. § 1257: State Courts; certiorari

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme

[1] Contel erroneously states that the Illinois Supreme Court's order should be reviewable under § 1257. (Pet. at 1.) Because the Illinois Supreme Court merely declined to review the decision of the Appellate Court, the decision of the Appellate Court (*if* considered final) would be the one reviewable by this Court. *See Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968).

> Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

47 U.S.C. § 414: Exclusiveness of chapter.

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

COUNTERSTATEMENT OF THE CASE

An examination of the proceedings below reveals that Contel's petition improperly seeks review of a nonfinal order. Contel filed a motion to dismiss the complaints filed against it by Leaf River and Central Cellular in the Illinois circuit court. On October 12, 1994, the circuit court denied Contel's motion to dismiss. On December 14, 1994, the circuit court denied Contel's motion for a finding that a question of law existed appropriate for interlocutory appeal under Ill. S.Ct. Rule 308. Contel nevertheless perfected an appeal under Ill. S.Ct. Rule 307, by characterizing its motion to dismiss as also a motion for a stay. On March 21, 1995, the Illinois Appellate Court affirmed the order denying Contel's motion to dismiss.

The court did not address what relief would be appropriate upon a final judgment, but held only that no impediments existed to the trial court's jurisdiction. (*See* Pet. at A16.) On October 4, 1995, the Illinois Supreme Court denied Contel's Petition for Leave to Appeal the interlocutory order of the Appellate Court, remanding the cases for trial on the merits. No final judgment or decree has been entered in these cases by any lower court. Rather, the cases have been proceeding in the circuit court.

Moreover, the complexion of the cases – and of the issues Contel seeks to have this Court review – has already changed during the course of these further proceedings. For example, the complaints Contel attaches to its Petition and refers to throughout were in fact mooted by amended complaints filed on August 17, 1995 that altered the prayers for relief, *e.g.*, by dropping any request for injunctive relief.

If this Court determines to examine the merits of Contel's petition, Contel's statement of the case describes most of the facts leading up to this litigation, but contains some material deficiencies regarding the background of the primary legal issue decided below – whether an Illinois state court has the power to decide claims for breach of a contract governed by Illinois law and for breach of the fiduciary duties owed under Illinois law by the general partner of an Illinois limited partnership.

Leaf River and Central Cellular filed these consolidated actions seeking relief for a breach of contractual and fiduciary obligations owed to them and the Rockford

MSA Limited Partnership (the "Partnership"). The Partnership provides cellular telephone service in and around Rockford, Illinois under an FCC license. Plaintiffs contend that Contel, the general partner of the Partnership, breached its obligations under the Partnership Agreement and its fiduciary duties by misappropriating for itself the opportunity to provide cellular service in Illinois RSA 1, a cellular market adjoining Rockford. Accordingly, Leaf River and Central Cellular seek money damages for the value of the lost business opportunity Contel misappropriated.

Contrary to Contel's representations in its petition, (*see* Pet. at 14, 15, 17), Leaf River and Central Cellular have repeatedly and consistently explained that they do not seek "ownership" or "control" of the FCC license that Contel obtained for itself, nor do they seek a "transfer" of the FCC license for Illinois RSA 1. (*See* App. Order, Pet. at A15.) Plaintiffs have not requested specific performance of Contel's obligation to pursue the RSA 1 license on behalf of the Partnership and its partners, but, as the Appellate Court recognized, seek substitutional relief instead, in the form of money damages:

> Plaintiffs . . . have not asked the trial court to transfer control of the license. They seek only compensatory damages from defendants for their offenses as general partners, specifically (1) seizing a partnership opportunity for themselves and (2) breach of the provision of the partnership agreement which requires that if the general partner applies for a license to serve another service area, the application shall be on behalf of the partnership.

(*Id.*) In fact, to make clear that they seek damages as opposed to any ownership or control over the FCC license, since the time of the Appellate Court's decision Leaf River and Central Cellular amended their complaints to eliminate the request for relief that sought to require Contel to share all benefits from its interest in Illinois RSA 1 – an important fact that Contel neglects to mention. (*See* Pet. at 13.) Contel also fails to mention the primary request for relief in both the original and amended complaints, namely, "compensatory damages in an amount to be determined at trial." (Pet. at A28, A39.)

REASONS WHY THE PETITION SHOULD BE DENIED

Contel's petition should be denied because no final judgment or decree has been entered, concerning the "transfer" or "ownership" of an FCC license or otherwise. Indeed, Contel casts its entire argument hypothetically, in order to discuss the federal questions that it believes would arise "*if* the state court were to grant" certain relief. (Pet. at 14) (emphasis supplied). Further, one of the two forms of relief Contel believes would offend federal law has already been removed from the case by virtue of subsequent proceedings. Plaintiffs' remaining requests for relief have not yet been granted or denied, rendering Contel's petition premature.

Even if this Court were to consider the merits of Contel's petition, no reason to grant certiorari is presented. Contel claims that the Illinois Appellate Court erred by relying on Section 414 of the Federal Communications Act and holding that these private disputes could

proceed in Illinois state court. Section 414 is clear, however, and has been consistently applied the way the Illinois Appellate Court did here. The bulk of Contel's petition simply recites patently irrelevant FCC regulations and asserts that their potential application to the particular facts of this action should be deemed "important." By failing to cite any decisions by any court agreeing with its position, however, Contel has raised no conflict of authority requiring review. Moreover, no question of law exists that has not been settled by this Court, nor has one been decided in a way that conflicts with the decisions of this Court. Indeed, Contel simply attempts to avoid this Court's well-established precedent. Finally, even the FCC, whose policy Contel claims needs protecting, has consistently repudiated Contel's position. In short, this purely private dispute raises no questions of general importance appropriate for review.

I. THIS COURT LACKS JURISDICTION TO HEAR THE PETITION UNDER 28 U.S.C. § 1257 BECAUSE THE ORDER DENYING PETITIONERS' INTERLOCUTORY APPEAL WAS NOT A FINAL JUDGMENT OR DECREE.

This Court lacks jurisdiction to hear Contel's petition because no final judgment or decree has been entered in these cases. Contel does not even address this threshold issue in its petition, instead launching into arguments which, by their contingent nature, demonstrate that no review should take place at this time. The petition attacks a lower state court's interlocutory order affirming the denial of Contel's motion to dismiss. This Court's review of state court decisions is limited, however, to "[f]inal

judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257. Therefore, the general rule is that the state court judgment "must . . . be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street Ry. v. Railroad Commission*, 324 U.S. 548, 551 (1945). If acts remain to be performed on remand that are not merely ministerial, and that might themselves create a federal question, the judgment is normally deemed nonfinal and nonreviewable. *Houston v. Moore*, 3 Wheat. 433, 434 (1818); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 632-33 (1981); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). Here, the Appellate Court's interlocutory order remanded these cases for trial in the circuit court on the merits. Thus, under the literal terms of § 1257, such an order is not reviewable.

The finality requirement of § 1257 serves several important policies: "(1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs." *North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159 (1973). Granting Contel's petition would offend all of these principles. First, Contel seeks piecemeal review of an interlocutory order denying its motion to dismiss complaints – which have since already been amended. Any ensuing final disposition by the trial court will likely beget further appeals by one or

both sides, which may in turn present reviewable federal issues.

More problematic, however, is that Contel's petition seeks an advisory opinion on the relevance and application of FCC regulations to forms of relief that have not yet been ordered, including one request for relief – the injunction to share benefits – that has already been eliminated from the case as a result of plaintiffs' amendment of their complaints. In fact, Contel prefaces its entire argument on a contingency, "*if* the state court were to grant the requested relief." (Pet. at 14) (emphasis supplied). Although Contel claims that *if* the trial court were to grant the injunction which plaintiffs no longer seek or an accounting, such an order would violate federal law (Pet. at 13, 17, 22), nowhere does Contel show how granting the primary claim for compensatory damages would implicate federal law. Since no court has determined which, if any, form of relief ought to be awarded against Contel, the petition is hopelessly premature. *See San Diego Gas & Elec. Co.*, 450 U.S. at 633 (declining review where no final decision on the propriety of all possible remedies). Finally, Contel's petition would also cause federal intrusion in the State of Illinois' affairs, by interrupting the state court's adjudication of claims for breaches of Illinois laws. *See Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945) (the finality prerequisite "derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court").

Although this Court may apply a "pragmatic" interpretation of the finality requirement in exceptional circumstances where a case is not literally concluded, *see Bradley v. Richmond School Board*, 416 U.S. 696, 722-23 n.28

(1974), none of those circumstances exists here. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court delineated four narrow categories where review of state decisions prior to final disposition of a case may be appropriate. The first category is "where for one reason or another the federal issue is conclusive or the outcome of proceedings preordained." *Id.* at 479. This exception does not apply here because neither the outcome of a trial on the merits, nor the proper form of relief to be granted, was decided or preordained by the interlocutory order.

The second exception to the finality rule concerns situations "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. The Court gave as an example *Radio Station WOW, Inc.*, where review was granted to an order of the Nebraska Supreme Court finding fraud and directing the transfer of the properties of a federally licensed radio station. By contrast, the instant interlocutory order did not adjudicate the merits of the claims or direct a transfer of a licensed facility. Contel simply claims that such a transfer order, *if* one were to be issued, would cause a "collision" with federal law. (Pet. at 17, 19.) Given that Leaf River and Central Cellular do not even seek any transfer, however, Contel's inchoate fear of a collision does not warrant this Court's immediate intervention.

The third exception to the finality requirement may occur "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the

case." *Id.* at 481. This category applies to cases where, if the petitioner were to lose on the merits, "governing state law would not permit him again to present his federal claims for review." *Id.* Such an exception again is inapposite because upon a final judgment and grant of any relief, Contel would have an opportunity to raise on appeal any appropriate federal defense to such an award.

The final exception to finality under *Cox Broadcasting Corp.* is "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* where "a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.* at 482-3. To define this narrow category, the Court cited *Construction Laborers v. Curry*, 371 U.S. 542 (1963), which reviewed the grant of a temporary injunction enjoining a union from picketing even though the National Labor Relations Board had exclusive jurisdiction over the claim. Jurisdiction in *Curry* also rested on the ground that the union had no defense to a permanent injunction other than its federal one that had already been decided. 371 U.S. at 542. By contrast, no relief has been granted in these cases, and Contel's arguments merely address a portion of the relief that might be awarded. Further, no important federal interests will be eroded by permitting the Illinois state court to determine the state law claims for breach of contract and fiduciary duty and to determine what relief, if any, is permissible

and appropriate. *See Flynt v. Ohio*, 451 U.S. 619, 622 (declining review where delay until a final judgment would not seriously erode federal policy). Rather, the important federal interest here is to avoid creating any false "conflict between the courts of two different governments," an interest which is most effectively promoted by denying Contel's premature petition for review of an interlocutory state court order. *Radio Station WOW*, 326 U.S. at 124.

II. NO QUESTION EXISTS THAT THE COMMUNICATIONS ACT EXPRESSLY PRESERVES STATE COURT REMEDIES FOR THE INSTANT CLAIMS FOR BREACH OF CONTRACT AND FIDUCIARY DUTY.

Contel's apparent basis for requesting review of the lower state court decision is that the Illinois Appellate Court relied too "heavily" on Section 414 of the Communications Act in holding that these disputes should proceed in the state trial court. (Pet. at 14.)[2] Contel has failed, however, to raise any question, let alone one deserving of certiorari, about the language of § 414 of the Communications Act in relation to these garden-variety breach of contract and fiduciary duty actions. The express language

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[2] This type of argument, that a misapplication of law occurred, is in itself a weak basis for seeking review. *See* S.Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.")

of the Communications Act provides the best reason that Contel's claim of preemption is unfounded:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

47 U.S.C. § 414. Thus, Contel's claim that "the relief requested" by Leaf River and Central Cellular has somehow been preempted flies in the face of Congress's express preservation of common law and statutory remedies, of which compensatory damages is the most obvious example.

A. CONTEL'S PATENTLY IRRELEVANT AUTHORITIES RAISE NO QUESTION FOR REVIEW.

Glossing over the express savings provision of Section 414, Contel cites a series of FCC regulations and decisions that are not only prematurely raised, (*see* Section I, *supra*), but also irrelevant. Contel argues that Leaf River and Central Cellular seek to share "control over" or "ownership in" the Illinois RSA 1 FCC license. (Pet. at 14, 15.) From this presumption, Contel argues that because such a result would violate FCC regulations under the particular facts of these cases, the claims against Contel must be preempted. In order to make this argument, however, Contel persists in an intentional misunderstanding of plaintiffs' original complaints and ignores plaintiffs' amended complaints. Plaintiffs do not request transfer of, an ownership interest in, or control over, Contel's FCC license. Rather, as plaintiffs have repeatedly

explained to defendants, as they expressly advised the courts below, as the Appellate Court recognized (see p. 4 *supra*), and as plaintiffs have made explicit by amending their complaints, plaintiffs seek only money damages for Contel's breaches of common law contract and fiduciary obligations, in an amount equal to the value of the interest which Contel obtained by breaching its duties with regard to the business opportunity in Illinois RSA 1. The series of statutes and regulations cited by Contel never were intended to address such a purely private dispute, and have never been so applied.

Thus, Contel's citation of 47 C.F.R. § 22.942 (Pet. at 15), which prohibits a party from holding an "ownership interest" in both licenses for one cellular market, is irrelevant because respondents seek no such interest. Likewise, Contel's citation of Section 310 of the Communications Act (Pet. at 17), which requires an application to the FCC before "transfers of control" of an FCC license, is equally beside the point because plaintiffs seek no such transfer. Finally, Contel's citation of Section 332 of the Communications Act (Pet. at 18-19), pertaining to "entry regulation," remains a *non sequitur*. As the Illinois Appellate Court recognized, by no stretch of language, or imagination, do Leaf River and Central Cellular seek for the state of Illinois "to regulate the entry of or the rates charged by any commercial mobile service." (Pet. at A16-17). At bottom, Contel simply presents no decision by any court, or by the FCC, applying these regulations and provisions to a common law claim, to a request for money damages, or to any question of federal preemption.

B. CONTEL RAISES NO QUESTION APPROPRIATE FOR REVIEW BECAUSE THIS COURT'S DECISIONS HAVE CONSISTENTLY RECOGNIZED A STATE COURT'S POWER TO ADJUDICATE STATE LAW CLAIMS, EVEN WHERE THEY PERTAIN TO AN FCC LICENSED BUSINESS, AND NO CONFLICT EXISTS.

Contel fails to present any conflict between lower court decisions or those of this Court warranting certiorari. This Court recognized the respective spheres of jurisdiction of the FCC and state courts in *Radio Station WOW v. Johnson*, 326 U.S. 120 (1945). In that decision, the plaintiff sued in state court to have a lease and assignment of an FCC license set aside for fraud. 326 U.S. at 121. The Nebraska Supreme Court ordered that the lease and license be set aside, and ordered an accounting of the station's revenue by the lessee. *Id.* at 122. This Court permitted the accounting to proceed in the state court, and further held "[w]e have no doubt of the power of the Nebraska court to adjudicate, and conclusively, the claim of fraud in the transfer of the station . . . and upon finding fraud to direct a reconveyance of the lease to the [plaintiff]." *Id.* at 131. The Court explained, "[t]he 'public interest' with which the Commission is charged is that involved in granting licenses. Safeguarding of that interest can hardly imply that the interest of the States in enforcing their own laws against fraud have been nullified insofar as licensed facilities may be the instruments of fraud." *Id. See also FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1939) ("The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication"). To the

same effect, in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950), this Court determined that a state court had the power to award damages for breach of contract even where performance under the contract would have violated FCC policy. The Court stated, "[w]e do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others." *Id.* at 602. Similarly, the defense of legal impossibility was summarily disposed as "a matter of state law." *Id.* at 594. These decisions firmly support the exercise of jurisdiction by an Illinois court in enforcing Illinois laws against breach of contract and breach of fiduciary duty. Contel fails to mention *Radio Station WOW* or *Regents* until the penultimate page of its petition, and then only to waffle between: (a) weakly distinguishing them as involving a radio station instead of a rural cellular telephone license, and (b) suggesting that they are somehow wrong for "today's environment." (Pet. at 23.) Neither assertion merits this Court's review.

Further, the Communications Act has also been consistently construed by the lower courts the way the Illinois courts did here – as preserving private, independent state law claims among licensees for the courts, not for the FCC. *See, e.g., United Tel. Co. of Carolinas, Inc. v. FCC*, 559 F.2d 720, 723 (D.C. Cir. 1977) (affirming an FCC decision not to adjudicate a dispute among joint venturers, "the Communications Act . . . should not be turned into a mechanism whereby participants in a joint communications project can force the Federal Communications Commission to arbitrate contractual disputes over the division of residual revenues from their joint venture. The purpose of the Act is to protect the public interest

rather than to provide a forum for the settlement of private disputes"); *KVHP TV Partners, Ltd. v. Channel 12 of Beaumont, Inc.*, 874 F. Supp. 756, 762 (E.D. Tex. 1995) (section 414 "expressly preserves state causes of action for breaches of duties that are not created by the Communications Act"). Thus, by literally applying Section 414, the Illinois Appellate Court broke no new ground.[3]

C. CONTEL RAISES NO QUESTION FOR REVIEW BECAUSE THE FCC CONSISTENTLY AGREES WITH THE INTERPRETATION OF THE COMMUNICATIONS ACT ADOPTED BY THE COURTS BELOW.

Notably, Contel also fails to present any true conflict between the lower court order and decisions of the FCC, citing no FCC decisions that purport to adjudicate claims such as the ones made here. In fact, an examination of FCC decisional law reveals that the FCC refuses to become involved in private matters such as this, instead referring them back to the courts – even where questions arise regarding control of cellular licenses. *See, e.g., In the*

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[3] Contel errs in suggesting that OBRA's amendment to the Communications Act somehow trumps the savings clause of section 414, which Congress left untouched. (Pet. at 18-19.) The lower court properly refused to infer that such oblique language on "entry regulation" evinces a legislative intent to override the express savings clause preserved in the Act. (Pet. at A16-17.) *See also Cooperative Comm. v. AT&T Corp.*, 867 F. Supp. 1511, 1516 (D. Utah 1994) (post-OBRA, holding that "inclusion of the [section 414] savings clause clearly indicates Congress' intent that independent state law causes of action , such as interference with contract or unfair competition, not be subsumed by the Act, but remain as separate causes of action").

Matter of Applications of Centel Corp., 8 FCC Rcd. 1829, 1831 (1993) (refusing to consider a claim that transfer of control of a cellular license would violate the parties' partnership agreements, "[t]he Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them"); *In re Applications of Decatur Telecasting, Inc.*, 7 FCC Rcd. 8622, 8624 (1992) (same); *In re Application of Rodney A. McDaniel*, 4 FCC Rcd. 1736 (1989) ("any harm which [petitioner] might suffer from the transaction can be satisfied by money damages pursuant to local judicial determination. Thus, *our action does not in any way prejudice any remedy to which a court may ultimately determine MC is entitled*") (emphasis supplied, citations omitted); *In re Applications of Wind N' Sea FM Limited Partnership*, 7 FCC Rcd. 2293, 2294 n.5 (1992) ("[t]he Commission has long held that it has neither the authority nor the machinery to adjudicate alleged claims arising out of private contractual agreements"); *In re Applications of KQED, Inc.*, 6 FCC Rcd. 625, 626 (1991) (same). Finally, consistent with this policy it is worth noting here that the FCC has never held that the mere award of compensatory damages constitutes an ownership interest or control over an FCC license.[4]

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[4] Moreover, even if, *arguendo*, the relief ultimately awarded in this litigation does involve matters touching on an interest of the FCC, the court could at that time simply fashion an appropriate remedy. *See Radio Station WOW*, 326 U.S. at 132 ("State power is amply respected if it is qualified merely to the extent of requiring it to withhold execution of that portion of its

Thus, not even the FCC agrees with Contel's position that the claims in this case should not be adjudicated by the Illinois courts, but would refuse to resolve this private dispute concerning the interpretation of a contract or fiduciary duties or to award damages for the breach of such duties. In sum, the overwhelming weight of authority, all of which Contel fails to address in its petition, agrees that these actions belong where they are now: awaiting trial on the merits in Illinois state court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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decree requiring retransfer of the physical properties until steps are ordered to be taken, with all deliberate speed, to enable the Commission to deal with new applications in connection with the station").

Supreme Court, U.S.
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No. 95-908

In the Supreme Court of the United States

OCTOBER TERM, 1995

CONTEL CELLULAR INC. AND
CONTEL CELLULAR OF ILLINOIS, INC.,

Petitioners,

v.

LEAF RIVER VALLEY CELLULAR TELEPHONE
CO., INC., AND CENTRAL CELLULAR
TELEPHONES, LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents have raised a new issue in their response and have made erroneous statements of facts

that compel this reply by petitioners to Respondents' Brief in Opposition to Petition for Writ of Certiorari.

This Court has Jurisdiction Under Section 1257.

The respondents submit a rather weak argument that this Court lacks jurisdiction. In arguing that the order of the Supreme Court of Illinois is not final under 28 U.S.C. § 1257, respondents miss the critical procedural point in this case. The state trial court erred in denying the motion to dismiss for lack of subject matter jurisdiction because the relief sought was within the exclusive jurisdiction of the FCC. If the motion is granted it ends the case. The federal issue of pre-emption is conclusive on the outcome. This Court pointed out in *Cox Broadcasting Corp. v. Cohn*[1] four categories that would meet the requirements of section 1257. Only one of the requirements need be met to satisfy section 1257. This Court held that if the outcome would be conclusive the finality requirement of the statute is met. A second requirement is also met by this case because regardless of the state court proceedings the federal Constitutional question will survive. Another criteria for finality under section 1257 is also met because reversal of the state court by this court would preclude any further action in the state court.

This Court has read section 1257 broadly in order

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[1] 420 U.S. 469 (1975).

to further important federal policy issues.[2] This case raises an important federal question involving the conflict between the states and the FCC concerning national telecommunications policy that warrants review. Section 1257 concerns jurisdiction. Respondents' are attempting to convert the statute to an agenda-setting device for the Court. Clearly, this court has jurisdiction to review this decision under section 1257 and the Supremacy Clause of the Constitution. The question of whether it is ripe or deserving of consideration by this Court goes not to jurisdiction, but to the substantive question of whether an issue of important federal constitutional jurisprudence is raised. Petitioners submit that it is raised because of (1) the national economic impact of telecommunications and (2) the conflict between state and federal regulatory roles.

STATEMENT OF FACTS

The respondents have gone outside the record that was before the Supreme Court of Illinois in referring to an amendment to their complaints which eliminated "the request for relief that sought to require Contel to share all benefits from its interest in Illinois 1."[3] That amended complaint was not before the appellate courts. It was not filed in the circuit court until after the decision by the Appellate Court of Illinois. Nonetheless, petitioners make

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[2] *Construction Laborers v. Curry*, 371 U.S. 542 (1963).

[3] *See* Respondents Brief in Opposition to Petition for Writ of Certiorari at p. 5.

this response to clarify the erroneous statement regarding respondents' amended complaints.

What respondents fail to mention is that the Circuit Court granted them leave to amend upon condition that their request for an accounting remain in the complaints.[4] The transcript of the hearing before the state trial court regarding the amended complaint is found in the Supplemental Appendix attached hereto.

The issue raised by the original complaints is retained by the trial court: namely that the relief respondents seek would give them a share of the ongoing profits of the business. It is that sharing of profits that brings into question the FCC's regulation because it would involve ownership interest in both licenses in the same market. If this Court holds that the state action is preempted, it disposes of the case.

Respondents argue that they only seek money damages by amending their complaint. That is simply untrue. They seek the equitable remedy of an accounting of profits derived from the alleged partnership opportunity. Their amended complaint as permitted by the trial court, did not change the nature of the relief sought as is shown by the transcript of the hearing before the trial court. Contrary to respondents assertions, the issues raised before this Court have not been mooted.

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[4] Hearing Transcript, Circuit Court for the 17th Judicial Circuit County of Winnebago, August 11, 1995. Supplemental appendix hereto. (A -18).

FCC Has Not Agreed With State Court Interpretation of Section 414

The FCC most recently in *Richmond Bros. Records, Inc. v. U.S. Sprint Communications Co.*,[5] held that section 414 does not give state courts the right to entertain an action that conflicts with other provisions of the Communications Act and or FCC regulations. That decision, however, notes a conflict among courts regarding the interpretation and application of section 414.[6] That conflict is what this case is about and the reason why review by this Court is needed.

CONCLUSION

The importance of a uniform national telecommunications policy is reflected in Congress' adoption of the OBR Amendment[7] exempting cellular from state regulations. Section 414 should not be a barrier to this federal policy. For the foregoing reasons respondents are wrong and the writ should be granted.

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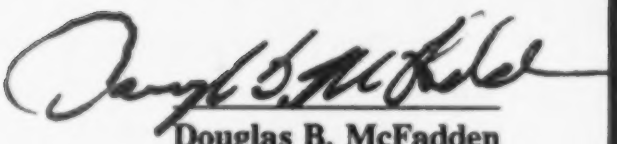
[5] FCC Docket No. DA 95-2438 (Common Car. Bur.)(Released Dec. 13, 1995).

[6] Id. at note 24.

[7] Petition for Writ of Certiorari at p. 4.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

LEAF RIVER VALLEY CELLULAR TELEPHONE CO., INC.,	)
	)No. 94-CH-148
Plaintiff,	)
v.	)
CONTEL CELLULAR, INC., a Delaware Corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois Corporation,	)
Defendants,	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)
CENTRAL CELLULAR TELEPHONES, LTD., an Illinois corporation,	)
Plaintiff,	)

v.	)
CONTEL CELLULAR INC., a Delaware corporation, and CONTEL CELLULAR OF ILLINOIS, INC., an Illinois corporation,	)No. 94-CH-151
Defendants.	)
and	)
ROCKFORD MSA LIMITED PARTNERSHIP, an Illinois Limited Partnership,	)
Nominal Defendant.	)

REPORT OF PROCEEDINGS at the Hearing of the above-entitled cause before the Honorable Gerald F. Grubb, Judge of said Court, on Friday, the 11th day of August, A.D., 1995.

APPEARANCES:

MS. KATHLEEN ROACH,
Attorney-at-Law,

on behalf of the Plaintiffs.

MR. JEFFREY M. CROSS and

MR. PETER CARLSON,
Attorneys-at-Law,

on behalf of the Defendants
Contel Cellular, Inc. and
Contel Cellular of Illinois, Inc.

Kathi Anderson, CSR, RPR
Official Court Reporter
License No. 084-002107

THE CLERK: 94-CH-148 94-CH-151.

MS. ROACH: Kathleen Roach represents the plaintiff in the consolidated cases.

MR. CROSS: Jeffery Cross and Peter Carlson from Kelley Drye & Warren represents both defendants Contel Cellular and Contel Cellular of Illinois.

MS. ROACH: We are here this morning for argument on Plaintiff's Motion for Leave to Amend their complaints.

Just a brief bit of background on the case, both the allegations made and the procedural posture, Your Honor, Plaintiffs are limited partners in a partnership formed for the purpose of providing cellular telephone service in what is know as the Rockford Metropolitan Statistical Area or the Rockford MSA. The partnership was formed with a partnership agreement, and this agreement contains a provision which forms the basis for the breach of contract county in each of the Complaints.

That provision states basically that the -- any applications by the general partner, and the general partner in this case is Contel - any applications by the general partner or its affiliates to provide cellular service in areas adjoining the Rockford MSA shall be deemed to be made on behalf of the partnership.

Contel filed an application to provide cellular telephone service in an area known as Illinois RSA 1. RSA stands for Rural Service Area. And RSA -- Illinois RSA 1 does adjoin the Rockford MSA. And plaintiff's have alleged that by virtue of Section 818 of the partnership agreement, the section I just paraphrased to you a moment ago, that Contel's application in Illinois RSA 1 shall be deemed to be made on behalf of the partnership.

Plaintiffs have also alleged in the second counts of their Complaints that the same conduct violated Contel's fiduciary obligations that they owe as general partner to the limited partners, in this case the plaintiffs.

The breach of fiduciary duty law is similar to the issue of the corporate opportunity doctrine. Someone such as the general partner of a partnership when opportunity becomes available to it cannot seize that opportunity for itself to the detriment of those to whom it owes fiduciary obligations, in this case the limited partners.

That, in brief, is what the allegations, --the substantive allegations of the Complaints are.

In the original Complaints plaintiffs had a request for compensatory damages but also had certain requests

for equitable relief. And those requests included a request for an accounting and a request for an injunction for Contel to transfer the benefits of its ownership in RSA 1 which I should retreat for a moment. Contel's application to provide cellular service in RSA 1 with the FCC is successful and Contel is now providing such service along with a limited partner. After the Complaints were filed, defendants moved to dismiss alleging statute of limitations and also raising FCC preemption issues. And in the course of their Motion to Dismiss defendants characterized plaintiffs -- the thrust of plaintiffs request for relief is a request that Contel transfer its interest in RSA 1 to the partnership. And what plaintiffs have said repeatedly both in arguments to the trial court and in their papers in the trial court and in the appellate court that's really not what plaintiffs were interested in. What plaintiffs were interested in was substitutional relief, not specific performance. What they wanted was compensatory damages to compensate them for the value of the opportunity which was taken by Contel to the detriment of the plaintiffs. Contel nevertheless pressed its argument that what we were really seeking was specific relief. But the trial court denied the Motion to Dismiss, and the appellate court affirmed that ruling and found that plaintiffs' Complaints did indeed state a cause of action as pled in their original form. Notwithstanding defendants' arguments regarding -- their argument that because we were seeking in -- according to them, specific performance, it raised issues regarding potential violation of FCC rules.

THE COURT: Did it really say that it stated a cause of action? Wasn't the opinion from the appellate court basically saying no, there's no preemption?

MS. ROACH: That's true. I think --

THE COURT: They didn't really say there's a cause of action.

MS. ROACH: The appellate court did not say that there was a cause of action but they affirmed the ruling denying the Motion to Dismiss and allowed the Complaints to go forward.

At the same time that the appellate court was issuing its ruling, I think, in fact, the day before plaintiff's counsel received the ruling we filed a Motion for Leave to Amend our Complaints to eliminate the confusion that had arisen as a result of our original Complaints where plaintiff and defendant disagreed as to what relief plaintiff was seeking which is sort of an odd situation in a case. It should be clear and apparently from our original Complaints it wasn't clear, and we wanted to make it clear. And our original Complaints are virtually identical to the Amended Complaints that we want to file with the exception that we are seeking to remove the incidental request for equitable relief that we had included the first time around which Contel found to be problematic. And since we have said all along that what we really want is compensatory damages we will make that clear in our Complaints. So our Motion for Leave to Amend seeks to give us leave to file Complaints -- Amended Complaints which seek compensatory relief and do not seek the other forms of relief which Contel found to be problematic the first time around.

Defendants have obviously opposed our Motion for Leave to Amend for a number of reasons. Much of their brief filed in opposition to our motion focuses on whether

or not they will still be able to maintain various of their affirmative defenses. And our position, Your Honor, is that it is simply premature. We are not there yet. Whether or not they will have affirmative defenses to our Amended Complaint is not an appropriate issue to consider now on the issue of whether or not we should be allowed to amend our Complaint in the first instance. And the Illinois case law identifies the issues to be considered in determining whether or not a Complaint should be amended, and whether or not defendants will have -- still be able to plead the same affirmative defenses, it is not an appropriate issue to consider at this time. I expect that we will get there. As far as whether or not their affirmative defenses will be valid. But it is simply not an appropriate issue to consider at this time. What the Illinois cases say, indeed going a step back as far as Contel also argues that the Amended Complaint doesn't state a cause of action, even that is not the appropriate issue to consider at this time under the circumstances. The Illinois courts have said that the appropriate method of challenging the sufficiency of a Complaint is through a Motion to Dismiss, not by opposing a Motion for Leave to Amend in the first instance.

Now there are times when it is appropriate to consider whether or not the Amended Complaint will state a cause of action. But that's where the original Complaint was dismissed for failure to state a cause of action. And it is appropriate at that time for the courts to consider whether amendments would be futile. If the first time around they, the plaintiffs, were not able to succeed in stating a cause of action, especially if it's been two or three times and it is now a Fourth Amended Complaint, it is appropriate for the court to say we are

really wasting everybody's time here; it's the forth Complaint. The first Complaint survived a Motion to Dismiss not only in the trial court but in the appellate court as well. The appellate court found that the Complaint -- found that the Motion to Dismiss was properly denied and considered Contel's arguments about the various equitable forms of relief that were requested and nevertheless found that there was no preemption based on the arguments that Contel made based on their theory that we were really seeking specific performance.

The other prong of Contel's argument now in opposition to the Motion for Leave to Amend is that our amended Complaints are not valid because we do not seek an accounting. And what Contel has said is that an accounting is absolutely necessary in actions between partners involving claims of breach of fiduciary duty. And that is simply not the law in Illinois. Although there are certain times where it is appropriate to have an accounting, and, in fact, there are times where it is necessary to have an accounting, those times are limited to where it is necessary to delve into the partnership's accounts. And the general rule that an accounting is necessary in actions between partners is subject to a fairly substantial exception which is that an accounting is not necessary where one does not need to delve into the partnership's accounts in order to decide the action and award relief.

This is one of those cases. Our claim is for damages relating to the value of Contel's interest in RSA 1. In order to determine what that value is we do not need to get into the accounts of the Rockford partnership.

THE COURT: I don't understand how you would

be able to avoid that.

MS. ROACH: The interest in Illinois RSA 1 that Contel has which we claim was wrongfully denied to the limited partners may be valued in a couple of different ways. One way that it may be valued is by determining a market value though comparisons with other similarly situated rural service areas. I am not -- And this is sort of taking it out of the air. Which three, for example, is a RSA which is similar and that has been sold recently under similar circumstances; one can determine what the value per population equivalent is in that RSA and then determine what the value -- the value per population equivalent should be in Rockford RSA 1 and come up with a value for Contel's interest.

Another way of doing it is with a discounted cash flow and look at what Contel's experiencing in Illinois RSA 1, project that out into the future based on their experience in Illinois RSA 1 and discount it to present value. But in either case are you getting into what the accounts are between the plaintiffs and Contel in the Rockford partnership. The only way that comes into play is once you come up with a value for RSA 1 you have to determine what percentage plaintiffs would be entitled to. An that's basically their percentage in the Rockford partnership.

THE COURT: Doesn't it necessarily then involve partnership expenses to have to be deducted from that to arrive at a profit?

MS. ROACH: I apologize, Your Honor. My mind is blank at the moment as to what exactly the interest is.

THE COURT: I mean your client would not be entitled to more than what his partnership interest would be.

MS. ROACH: What my client would be entitled to is -- Correct. If my clients have 20 percent and I just don't recall right now what the percentage is. Actually it's more like 48 or something, isn't it? Anyway.

MR. CROSS: You have two clients. They each have 20 percent.

MS. ROACH: Okay. 40 percent. What my client would be entitled to is 40 percent of Contel's interest in Illinois RSA 1. And you don't need to get into determining what expenses and so forth they would have to pay because what we are doing is valuing the opportunities that Contel took for itself.

THE COURT: I guess I am still looking at it from the standpoint that the damage that Leaf River has can't be more than what they would have gotten out of the partnership had there been a partnership interest in RSA.

MS. ROACH: Well, that is certainly correct, Your Honor. But I don't think that determination requires more than a multiplication by the interest held by my clients. And even -- If you are going to get into the details of what's going on at Illinois RSA 1 and what Contel has paid out in capital expenditures to bill out that system and that sort of thing, that's not partnership's accounts. The partnership that our clients are in with Contel is the Rockford partnership and the Rockford partnership's accounts are not going to be involved at all in that inquiry.

THE COURT: Aren't there just general expenses of the partnership that can be deducted from the whole pot? That would actually cause a diminution of the profit out of the RSA 1, right?

MS. ROACH: Contel is already running RSA 1 and has expenses. . . The expenses that Contel incurs in running RSA 1 are already taken into account because it has those expenses and they are currently charged to RSA 1. So those expenses would already be considered. And it would be double counting if you then placed them into the Rockford partnership.

THE COURT: What's the Rockford one?

What is that?

MR. CROSS: MSA.

THE COURT: What is they were running at a loss. Couldn't they write the loss off against the profit on RSA 1? I mean isn't that what partners do?

MR. CROSS: (Nods head)

MS. ROACH: Hypothesizing RSA is running at an overall gain? That might make some difference in terms of what taxes are paid. But whatever -- If MSA is running at a loss our clients are already affected by that because they are in the partnership. And if RSA 1 partnership is running at a gain that would be considered in the context of performing the damages calculation. But I don't think there's any difference here if plaintiffs weren't in a partnership with Contel at all. If plaintiffs had a contract with Contel that said any application that Contel makes in

Illinois RSA 1 shall be deemed to be on our behalf and there's no partnership -- there's no Rockford partnership involved at all, the damages calculation is going to be no different.

THE COURT: What is it that they are in then? They are in a partnership.

MS. ROACH: They are in a partnership.

THE COURT: The partnership would only be the RSA 1. It wouldn't be the MSA. My understanding is that they are involved in -- If your analysis is right, the RSA 1 venture is a part of the MSA partnership.

MS. ROACH: If Contel had abided by its contractual and fiduciary obligations that would be true. But Contel has not done that. It has refused to do that. It says it has no obligation to do that. And we are not asking them to do that at this point. We are saying fine, you took the corporate opportunity, you pay for it in terms of damages; don't bring it into the partnership, it's not going to work at this point in time. In the meantime our client went out and got an interest in the competing system -- Not our client. One of the subsidiaries our our clients -- of my client went out and got an interest in the competing system in Illinois, RSA 1.

THE COURT: That was obtained afterwards?

MS. ROACH: That was obtained well afterwards by several years. And because of that under FCC rules the Illinois RSA 1 interest that Contel holds can't be transferred to the partnership without causing problems with FCC regulations.

THE COURT: You are saying at the time that they got the RSA 1 there was no prohibition.

MS. ROACH: That's correct. I believe the applications were filed in 1988 with Illinois RSA 1 and it wasn't until I believe the spring of 1992 that the subsidiary of my clients obtained the interest in the competing system.

MR. CROSS: Your Honor, let me cut to the last point so there's some clarification. The FCC prohibition against what is called cross-block ownership has always existed. But it wasn't until subsidiaries of the plaintiffs went out in 1992 and got the competing RSA interest that the cross-block ownership prohibition would come into effect. That's that cross-block ownership issue that forms the nub here of the dispute as to the characterization of the relief. Because the Federal Communications Commission rules provide that either directly or indirectly an entity can't have an interest in the two competing systems.

What is a direct or indirect interest in a competing system is at the heart of the relief here. Well, it's at the heart of the motions before Judge Penniman as to whether there was a preemption or not. And it was at the heart, I believe, of the Illinois appellate court. The Illinois appellate court did not make a finding as to whether this cross-block ownership was violated or not. All it held was that this court had jurisdiction in order to consider that issue applying whatever FCC standards this court would apply. But it did not decide whether there was that cross-block ownership.

The relief here is -- And what the relief ultimately

is is critical in terms of that issue. And I would submit to Your Honor that although Illinois does recognize that liberal right to amend, although I also submit that you can find cases at both extremes, what we are really doing here is we are doing a mere characterization of the relief and the guts of the relief is not changed at all. So in effect what counsel is saying to you is that by merely characterizing the relief they are going to try to avoid the dilemma that they find themselves in with the cross-block ownership issue. But I would submit to you that that characterization can't do it in this court not to just buy that -- into that characterization by allowing an amendment.

Your Honor, there is no need for them to amend in order to make the arguments that the relief that they really want is something other than the direct or indirect benefits that would violate the cross-block ownership. It doesn't change the essential nature of the case by making this amendment.

They say that they are going to eliminate the ancillary relief of accounting. But in effect they are not going to eliminate the ancillary relief. I think this court was right on the money in terms of its analysis. Because they say that they want the value of the RSA 1 partnership. But that value can't be taken out of context in the abstract. It has to be the value of the Rockford MSA partnership. The Rockford MSA partnership has a wholly different capital distribution structure, for example, than the RSA. When you said, Your Honor, that in your view you didn't see how Miss Roach's clients could get anything more than their partnership interest, I would agree with that. And the definition of their partnership interest means their interest after their capital

contributions after they take a percentage of the losses or the gains depending on what those are based on the Rockford partnership.

Now the RSA built seven cellular sites. Quite unusual for a RSA in this country. Because of the corridor, the I-80 and other corridors between Chicago and the Quad Cities. They built those all along except for one up in Freemont. That was a huge capital contribution. When you analyze the value of the RSA to the Rockford MSA and now have to take that into account with the new partners making a capital -- whether they actually make the capital contribution or you consider it as part of the math in calculating the relief, you are going to have to consider that capital contribution. There may be losses. Plaintiffs may owe Contel.

Contel by the way provided all the capital on the RSA. But in the Rockford MSA did not. Ameritech, Leaf River, Central Cellular, the others provided percentages of capital pursuant to the agreement. They may owe us money so that in determining that value you've got to take it into context of the Rockford MSA. So there is going to be an accounting of the benefits in the context of the Rockford MSA. And Illinois law does support that when you are looking at the issue of the partnership arrangement you've got to consider an accounting. Now there are exceptions to that rule but I would submit those exceptions don't apply here. Because this really is a damage to the partnership. And, in fact, they have sued in the partnership's name as well as in their individual names as a partnership because what they are saying is that the value of the RSA was a value to the partnership of which we as limited partners get a right.

So that the Rockford partnership is a party here.

Sidley & Austin ar very good attorneys, and I respect them highly, and I think it is significant that they originally filed this Complaint in chancery and added an accounting here. Because they recognize that in that situation and the situation we have an accounting was necessary. And I touched on that.

THE COURT: The new Compliant does not have an allegation for accounting?

MR. CROSS: That's correct. But the point I am making, Your Honor, is that's just a use of words. In effect, when you look behind those words you are still going to have to have an accounting. You are still going to have to have all the issues that will ultimately lead this court to make a determination as to whether the cross-block ownership rules are violated or not, as to whether there is a direct or indirect benefit here.

So I would submit that this court shouldn't really be a party to an attempt to manipulate the words in order to -- There's no question that the second step in this process on behalf of the plaintiffs is going to be then to move to strike our affirmative defenses, and I would grant that the affirmative defenses later on can be addressed at a second step. What I am saying here now is there's really no need for us to go through all these multiple steps because they are not really changing the guts and the substance of this Complaint. It's a mere choice of words in terms of the characterization of the relief.

Your Honor the appellate court, in effect, recognized in its opinion that what they were claiming was

compensatory damages. And they recognize that we said well, those are words they have chosen in order to avoid the problems of cross-block ownership. Because they realize if they directly ask for the license they would run up against that cross-block ownership because they went out and got the competing interest. The appellate court said we are going to allow the circuit court to determine whether there's an indirect or direct benefit that is being sought that would violate the cross-block ownership. So the appellate court recognized these two arguments in its opinion.

I would submit to you what is really happening -- I can't dispute the timing other than the fact that the appellate court's opinion came down March 21st. They filed their Motion to Amend on the 23rd. They claim they didn't get the opinion until the 24th. So be it. But the point is that the ultimate effect here is that they are running from the fact that the appellate court -- Now in front of you they are running from the fact that the appellate court has recognized that this issue is going to be before the court regardless of how they calls the words.

My point is you don't need to amend for this court to address that issue. We ought to address that issue head-on as to whether there's a cross-block ownership issue as well as there's the equitable remedy of accounting as well as to the other defenses here, Your Honor.

THE COURT: Anything else?

MS. ROACH: Your Honor, just very briefly. Whether or not our requested relief poses an issue with the cross-block ownership, we contend that it doesn't, they contend that it does, shouldn't affect whether or not you

grant us leave to amend the Complaints. Whether or not there are defenses which may be asserted to the relief requested shouldn't be an impediment to granting the Motion for Leave to Amend.

The Illinois case law is that leave to amend should be granted freely. And although Contel has argued that an accounting is necessary, the rule in Illinois is that one partner can bring an action against a co-partner if the plaintiff's claim can be decided without a full review of the partnership accounts. And I am quoting from the Century Universal Enterprises against Triana Development Corp. case. There are several cases to the same effect. Our contention is that's what the case is here. There is no full review of the partnership accounts which is necessary.

THE COURT: Okay. I disagree. I think you are probably going to have to have a full review of the partnership accounts in order to accomplish this. I would give you leave to amend but I would have to condition that upon you including within your Compliant the accounting provisions.

MS. ROACH: Okay. Thank you, Your Honor.

THE COURT: How soon can you do that?

MS. ROACH: We should be able to get something on file by the end of next week. A week from today, Your Honor.

THE COURT: At that point in time I will allow you to respond. The affirmative defenses may have to be restated depending upon how the Complaint comes out.

MR. CROSS: 28 days, Your Honor? The only reason I ask, I don't necessarily need so much time. Mr. Carlson and I may have to try a case --

THE COURT: 28 days to respond.

MS. ROACH: Thank you, Your Honor.

(Which were all the proceedings of record on this date.)

STATE OF ILLINOIS

IN THE CIRCUIT COURT OF THE

17TH JUDICIAL CIRCUIT

COUNTY OF WINNEBAGO

CERTIFICATE

I, Kathi Anderson, CSR, RPR, an Official Court Reporter, Seventeenth Judicial Circuit, Counties of Boone and Winnebago, State of Illinois, do hereby certify that I reported in stenotypy the above-entitled cause, and that I thereafter transcribed into typewriting this Report of Proceedings which I hereby certify is a true and correct transcript of said proceedings had before the Honorable Gerald F. Grubb, Judge of this Court, on the 11th day of August, 1995.

IN WITNESS WHEREOF I have hereunto set my hand this 20th day of September, 1995.

/s/ Kathi Anderson, CSR, RPR
Official Court Reporter
License No. 084-002107